

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 384

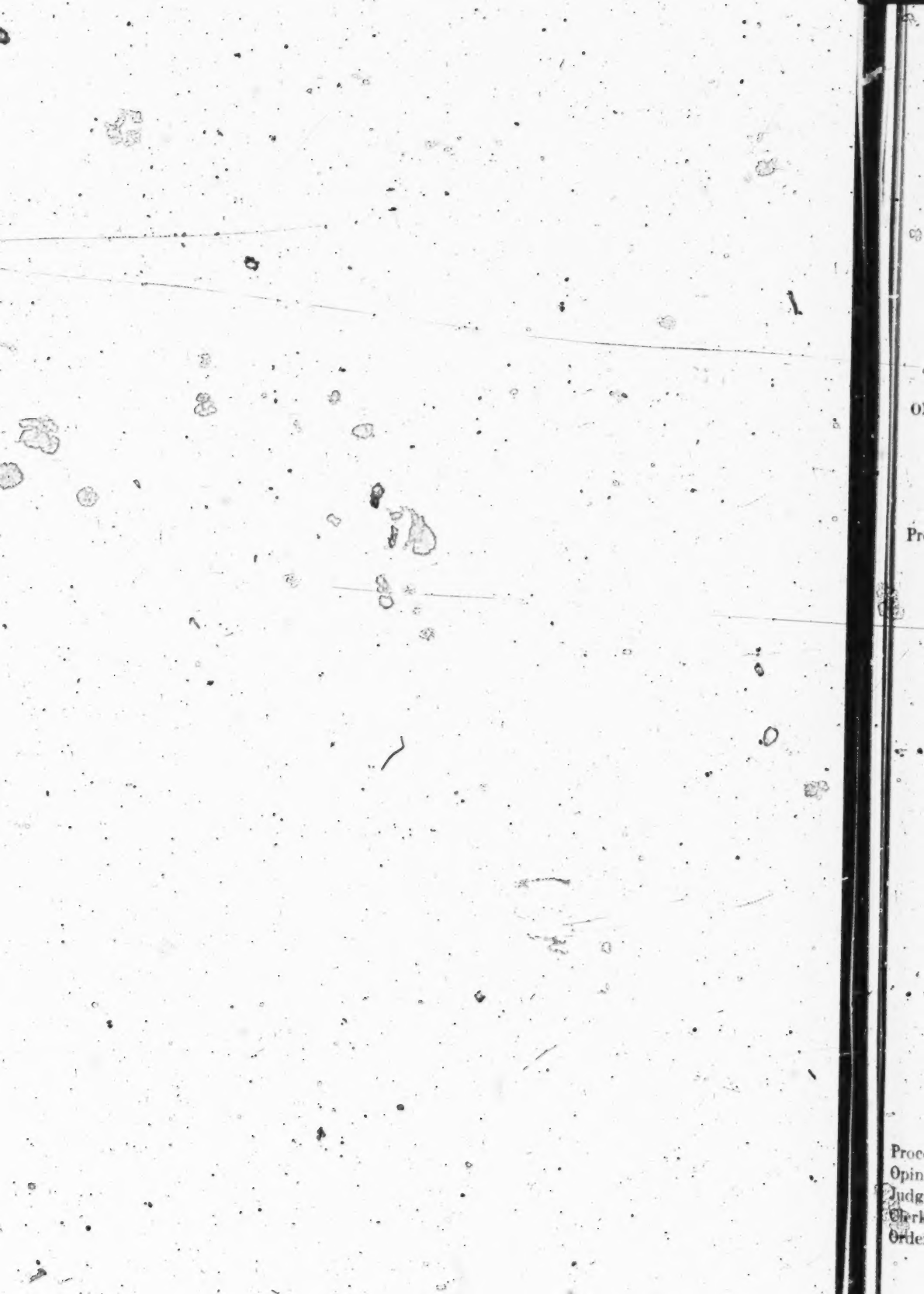
GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

MEREDITH WOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1939
CERTIORARI GRANTED NOVEMBER 6, 1939



Of

Pro

Proc
Opin
Judg
Clerk
Order

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

MEREDITH WOOD

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APPEALS FOR THE SECOND CIRCUIT

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Before United States Board of Tax Appeals

Docket No. 88426

MEREDITH WOOD, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer: Geo. M. Wolfson, Esq., Ralph A. McClelland, Cuthbert B. Caton. For Comm'r: Arthur Carnduff, Esq.

1937

Mar. 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Mar. 15—Copy of petition served on General Counsel.

Mar. 26—Notice of appearance of Geo. M. Wolfson as counsel filed.

Mar. 26—Notice of appearance of Ralph A. McClelland as counsel filed.

May 8—Answer filed by General Counsel.

May 11—Copy of answer served on taxpayer.

Nov. 11—Hearing set Jan. 10, 1938.

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Jan. 10—Hearing had before Mr. Tyson on merits. Submitted. Joint stipulation of facts filed. Petitioner's opening brief filed. Respondent's reply 30 days from hearing. Petitioner's brief due 15 days after respondent's reply.

Jan. 12—Copy of brief filed at hearing served on General Counsel.

Jan. 21—Transcript of hearing of Jan. 10, 1938, filed.

Feb. 2—Brief filed by General Counsel.

Feb. 8—Motion for leave to introduce additional evidence and if member fails to grant this motion, without further argument, to grant petitioner leave to argue orally in support of motion filed by taxpayer.

Feb. 16—Reply brief filed by taxpayer. 2/16/38 copy served on General Counsel.

Feb. 16—Hearing set 3/23/38 on above motion.

Feb. 17—Copy of motion and notice of hearing served on General Counsel.

Mar. 4—Stipulation of facts filed.

Mar. 23—Entry of appearance of Cuthbert B. Caton as counsel for taxpayer filed.

Mar. 23—Motion of February 8, 1938, granted.

Mar. 23—Hearing had before Mr. Tyson; petitioner's motion for leave to introduce additional evidence—granted.

1938

- June 17—Opinion promulgated, Mr. Tyson, Div. 1. Decision will be entered under Rule 50.
- July 12—Motion for reconsideration of opinion by the full Board filed by General Counsel.
- July 15—Order that respondent's motion for review by the entire Board is denied and respondent is granted an exception to the denial of his said motion, entered.
- July 28—Computation of deficiency filed by taxpayer.
- July 30—Hearing set Aug. 17, 1938, on settlement.
- Aug. 1—Copy of computation and notice of hearing served on General Counsel.
- Aug. 5—Computation of deficiency filed by General Counsel. 8/9/38 copy served.
- Aug. 13—Acquiescence to respondent's computation filed by taxpayer. 8/15/38 copy served on General Counsel.
- Aug. 18—Decision entered, John A. Tyson, Div. 1.
- Nov. 8—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by General Counsel.
- Nov. 17—Proof of service filed by General Counsel. Taxpayer.
- Nov. 17—Proof of service filed by General Counsel with affidavit attached (attorney for taxpayer).
- Dec. 27—Motion for extension of time to Feb. 7, 1939, to complete and transmit record filed by General Counsel.
- Dec. 27—Order enlarging time to Feb. 7, 1939, to complete and transmit record, entered.

1939

- Jan. 21—Agreed praecipe for record filed by General Counsel, with proof of service thereon.

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Before United States Board of Tax Appeals

Docket No. 88426

Petition

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter dated December 21, 1936, and as a basis of this appeal submits the following:

I. The petitioner herein is an individual and a citizen of the United States, having his present residence at Underhill Road, Scarsdale, Town of Greenburgh, Westchester County, State of New York.

II. That on or after December 21, 1936, there was mailed to Meredith Wood, the petitioner herein, a ninety-day letter proposing a deficiency in income tax for the year 1934 in the amount of \$1,228.23. A true copy of the deficiency letter is attached hereto and marked Exhibit A. The amount of the deficiency in controversy is \$1,224.03.

ASSIGNMENTS OF ERROR

III. The determination of the Commissioner of Internal Revenue, as set forth in said deficiency letter, is based upon the following errors:

(a) The Commissioner erred in including in the petitioner's income for the year 1934 the sum of \$8,750 paid as dividends on 25 shares of the capital stock of Book-of-the-Month Club, Inc., which said stock was held in trust by the petitioner as Trustee under a Declaration of Trust dated April 8, 1931, as modified by Supplementary Declaration of Trust dated March 25, 1932, wherein your petitioner was the settlor and trustee and Helen Martin Wood, the beneficiary; the income from said trust agreement having been included in the return of said Helen Martin Wood, the wife of the petitioner, for the taxable year 1934.

(b) The Commissioner erred in his determination that the said Declaration of Trust dated April 8, 1931, as modified by Supplementary Declaration of Trust dated March 25, 1932, was a revocable trust.

(c) The Commissioner erred in construing Article 166-1 of Regulation 86, as amended by Treasury Decision 4629 or any other regulation or law, as imposing the above mentioned tax liability upon your petitioner and as causing the income from the above mentioned trust for the year 1934 in the amount of \$8,750 to be included as part of the income of your petitioner, as there is no basis in the Revenue Act of 1934 for such regulation or construction thereof.

STATEMENT OF FACTS

IV. The facts upon which the petitioner relies as a basis of this appeal are as follows:

1. That heretofore and on or about the 8th day of April, 1931, your petitioner duly executed a Declaration of Trust in which your petitioner was the Settlor and Trustee and Helen Martin Wood was the Beneficiary, a copy of which Declaration of Trust is annexed hereto, made a part hereof and marked Exhibit B, and simultaneously therewith caused to be duly transferred to petitioner, as Trustee, 25 shares of the capital stock of Book-of-the-Month Club, Inc., which your petitioner, as Trustee, at all the times hereinafter mentioned and until the 8th day of April, 1936, held and continued to hold as the sole corpus of said trust under and pursuant to the terms of said Declaration of Trust.

2. The said Declaration of Trust dated April 8, 1931, provided that "This trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate.

"On the termination of the trust by reason of the expiration of said three years, or the death of Helen Martin Wood, all property then held in trust hereunder, shall be paid, delivered and transferred to

the Settlor to be his own property free of trust. On the termination of the trust by reason of the death of the Settlor, the said trust property shall be paid, delivered and transferred to the executors of the Settlor to be disposed of as part of his estate under his Last Will and Testament."

3. That thereafter and on or about the 25th day of March, 1932, your petitioner duly executed a Supplementary Declaration of Trust, bearing even date, which modified the above mentioned provision (a) of said trust agreement by extending the period of the trust from three years to five years, a copy of which Supplementary Declaration of Trust is annexed hereto, made a part hereof and marked Exhibit C.

4. That your petitioner reserved no right of revocation or modification of said trust as supplemented and said trust was irrevocable.

5. That said trust agreement as supplemented was at all the times between April 8, 1931, and April 8, 1936, and particularly during the year 1934, in full force and effect.

6. That on and after the 8th day of April 1931, and particularly during the year 1934, all dividends paid on said 25 shares of the capital stock of Book-of-the-Month Club, Inc., were received by your petitioner as such Trustee and deposited in a special bank account in the name of "Meredith Wood, Trustee."

7. That on and after the 8th day of April 1931, and particularly during the year 1934, all of the income from said trust was paid to the beneficiary thereof, Helen Martin Wood, by check drawn to her order.

8. That no dividends on said 25 shares of capital stock of Book-of-the-Month Club, Inc., were received by your petitioner individually during the year 1934.

9. That on and after the 8th day of April 1931, and particularly during the year 1934, all dividends received by your petitioner as such Trustee on account of said 25 shares of capital stock of Book-of-the-Month Club, Inc., in the amount of \$8,750 were paid to said Helen Martin Wood, the beneficiary of said trust, as the income therefrom; and the income so received by said Helen Martin Wood in the said sum of \$8,750, as your petitioner is informed and believes, was included as income in the income tax returns filed by said Helen Martin Wood for the year 1934.

10. That your petitioner duly filed his income tax return for the year 1934 with the Collector of Internal Revenue at the Custom House, Borough of Manhattan, New York, N. Y., and paid the tax shown to be due thereon in the amount of \$1,278.96; said return did not include the said dividends paid on said 25 shares of capital stock of Book-of-the-Month Club, Inc., during the year 1934 nor the income from said trust.

11. The respondent has proposed to increase the income of your petitioner for the year 1934 by the sum of \$8,750, representing dividends paid during that year on 25 shares of capital stock of Book-of-the-Month Club, Inc., which said shares were held by your petitioner as Trustee in the manner aforesaid and the dividends thereon were paid

to your petitioner only as such Trustee and thereafter paid by him as such Trustee to the beneficiary, Helen Martin Wood, and included within her income tax return for that year. Your petitioner heretofore had a hearing with respect to the foregoing before C. B. Allen, Esq., Internal Revenue Agent in Charge, 341 Ninth Avenue, New York, N. Y., on August 17, 1936, and has heretofore duly filed a protest with respect thereto with said Internal Revenue Agent in Charge as well as with the Commissioner of Internal Revenue at Washington, D. C.

PRAYER FOR RELIEF

V. Wherefore, petitioner prays that this Board may hear and determine this appeal and adjudge that the petitioner should not have included in his income for the year 1934 the sum of \$8,750, representing dividends declared on 25 shares of the capital stock of Book-of-the-Month Club, Inc., but that such dividends were properly included in the income of Helen Martin Wood, the wife of your petitioner; that the Declaration of Trust dated April 8, 1931, as modified March 25, 1932, is an irrevocable deed of trust, and that all income therefrom should not be included within the income of your petitioner but should be included in the income of said Helen Martin Wood; that Article 166-1 of Regulation 86, as amended by Treasury Decision 4629, is invalid in so far as it is construed as imposing the above mentioned tax liability upon your petitioner and as causing the income from the above mentioned trust for the year 1934 in the amount of \$8,750 to be included as part of the income of your petitioner; that said Regulation as amended by said Treasury Decision is invalid and there is no basis in the Revenue Act of 1934 therefore.

Petitioner further prays for such other and further relief as may seem just and equitable to this Board.

(Sgd.) MEREDITH WOOD,
 GEORGE M. WOLFSON,
 RALPH A. McCLELLAND,
 Attorneys for Taxpayer,
 165 Broadway, New York, N. Y.

Duly sworn to by Meredith Wood; jurat omitted in printing.

Exhibit A annexed to petition

TREASURY DEPARTMENT,
 OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
 Washington, Dec. 21, 1936.

Address reply to Commissioner of Internal Revenue.

Mr. MEREDITH WOOD,

Underhill Road, Scarsdale, New York.

SIR: You are advised that the determination of your income-tax liability for the taxable year 1934 discloses a deficiency of \$1,228.23 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:Cl:P:7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:

Statement;
Form 870.

STATEMENT

IT:A:2.

MHS-90D.

In re: Mr. Meredith Wood, Underhill Road, Scarsdale, New York.
Income-Tax Liability

Year, 1934; Income Tax Liability, \$2,507.19; Income Tax Assessed, \$1,278.96; Deficiency, \$1,228.23.

The deficiency shown herein is based upon the report dated June 20, 1936, prepared by Revenue Auditor G. C. Fogerty, a copy of which was transmitted to you under date of August 7, 1936.

Careful consideration has been accorded your protest dated August 17, 1936, in connection with the findings of the examining officer and the information submitted at a conference held in the office of the Internal Revenue agent in charge.

The adjustments are as follows:

Net income reported	\$18,473.30
Plus:	
1 Dividends	8,750.00
2 Error in addition	20.00
Total income	\$27,243.30

EXPLANATION OF CHANGES

1 Dividends reported	\$1,172.69
Dividends corrected	9,922.69
Restored to income	\$8,750.00

Dividends of \$8,750.00 paid on stock held in a revocable trust created by you for the benefit of your wife has been eliminated from the return filed by your wife, Mrs. Helen M. Wood, and included in your return.

2. An error of \$20.00 was made in determining the total of deductions claimed, the correct total being \$1,355.69 instead of \$1,375.69.

The items listed as deductions are as follows:

14 Interest paid	\$3.15
Taxes paid	1,143.74
Contributions	188.80
Other deductions	20.00
Total	\$1,355.69

COMPUTATION OF TAX

Net income adjusted	\$27,243.30
Less: Personal exemption and credit for dependents	2,766.65
Surtax income	\$24,476.64
Less:	
Dividends	\$9,022.60
Earned income credit (10% of \$14,000.00)	1,400.00
	11,322.60
Income subject to normal tax	\$13,153.95
Surtax on \$24,476.64	1,981.03
Normal tax at 4% on \$13,153.95	526.16
Tax liability	\$2,507.19
Tax assessed, account # 220063	1,278.96
Deficiency	\$1,228.23

15. In reply to Bureau letter dated November 18, 1936, wherein the recommendations of the internal revenue agent in charge, 341 Ninth Avenue, New York, New York, were approved, your representative stated that the protest submitted therewith contained no new facts or arguments, that you did not desire a conference in Washington, but that you wished to go on record as still protesting the deficiency; therefore, this final notice of deficiency is being issued.

A copy of this letter has been mailed to your representative, Mr. Ralph A. McClelland, % Rounds, Dillingham, Mead and Neagle, 165 Broadway, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

16 Before United States Board of Tax Appeals

Docket No. 88426

Answer

The Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

- I. Admits the allegations contained in paragraph I of the petition.
- II. Admits the allegations contained in paragraph II of the petition.

III. (a), (b), and (c). Denies that the Commissioner's determination is erroneous as alleged in subparagraphs (a), (b), and (c) of paragraph III of the petition.

IV. (1) Admits the allegations of fact contained in subparagraph (1) of paragraph IV of the petition, except that it is denied, for lack of information, that Exhibit B attached to the petition is a copy of said declaration of trust.

(2) Admits the allegations contained in subparagraph (2) of paragraph IV of the petition.

(3) Admits the allegations contained in subparagraph (3) of paragraph IV of the petition but, for lack of information, denies that Exhibit C attached to the petition is a copy of said supplementary declaration of trust.

17 IV. (4) Denies the allegations contained in subparagraph (4) of paragraph IV of the petition.

(5) Admits that said trust agreement as supplemented was from April 8, 1931, to and including the year 1934 in full force and effect; for lack of information, denies the remaining allegations contained in subparagraph (5) of paragraph IV of the petition.

(6) Admits that on and after the 8th day of April 1931, and particularly during the year 1934, all dividends paid on said 25 shares of the capital stock of Book-of-the-Month Club, Inc., were received by petitioner, but denies, for lack of information, the remaining allegations of fact contained in subparagraph (6) of paragraph IV of the petition.

(7) Denies, for lack of information, the allegations contained in subparagraph (7) of paragraph IV of the petition.

(8) Denies, for lack of information, the allegations contained in subparagraph (8) of paragraph IV of the petition.

(9) Denies, for lack of information, the allegations contained in subparagraph (9) of paragraph IV of the petition except that it is admitted that the sum of \$8,750.00 was returned by Helen M. Wood in her income-tax return for the year 1934.

(10) Admits that petitioner filed his income tax return for the year 1934 with the Collector of Internal Revenue at the Custom House, Borough of Manhattan, New York, New York; and admits that said return did not include the said dividends paid on said 25 shares of capital stock of Book-of-the-Month Club, Inc., during the year 1934

18 nor the income from said trust; denies the remaining allegations of fact contained in subparagraph (10) of paragraph IV of the petition.

IV (11) Admits that respondent has added said sum of \$8,750.00 to petitioner's income as returned for the year 1934, but, being without sufficient knowledge in respect of the payment of said dividends, denies that they were in fact paid to petitioner only as trustee and thereafter paid by him as such trustee to Helen Martin Wood. Admits that said Helen Martin Wood included said sum of \$8,750.00 in her 1934 income tax return. Denies all other allegations of fact contained in subparagraph (11) of paragraph IV of the petition.

V. Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Sgd.) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

CHESTER A. OWINN,

CHARLES E. LOWERY,

Special Attorneys,

Bureau of Internal Revenue.

CEL-mcm 5-7-37.

Before United States Board of Tax Appeals

Docket No. 88,426

Motion for leave to introduce additional evidence

Now comes the Petitioner by his attorney, George M. Wolfson, and respectfully moves this honorable Board for leave to introduce into evidence in this proceeding (a) a certain agreement made the 27th day of January 1931 between Harry Scherman and Meredith Wood, said agreement being referred to in the last paragraph of the Declaration of Trust attached to the petition herein as Exhibit "B", and (b) a certain agreement dated the 27th day of January 1931 between Robert K. Haas and Merle S. Haas and Harry Scherman and Bernardine K. Scherman and Meredith Wood, said agreement being referred to in the first-mentioned agreement of January 27, 1931, and that for such limited purpose the hearing herein shall be deemed to be reopened or a further hearing granted. A copy of said first mentioned agreement of January 27, 1931 is hereto attached as Exhibit 1, and a copy of said second-mentioned agreement is hereto attached as Exhibit 2.

In support of this motion it is stated that counsel for the petitioner inadvertently omitted to introduce said agreements into evidence at the hearing herein held on January 10, 1938, for the reason that no reference thereto was made in the deficiency letter of the Commissioner of Internal Revenue attached to the petition herein as Exhibit A, nor was any reference thereto made in the answer of the Respondent to the petition herein, nor was any reference thereto made by counsel for Respondent at the hearing herein held on January 10, 1938; nor in the oral argument which was had at the conclusion of that hearing. Petitioner did not know or believe that Respondent relied on said agreements for any purpose.

For the first time in this proceeding reference to said agreements was made in the brief of Respondent filed herein on February 2, 1938.

In the statement of facts in said brief, reference is made to the first mentioned agreement and the statement is made (page 9): "In so far as the agreement with Scherman was concerned, the stock was to be held and disposed of 'as though said stock were held and owned by the Settlor as an individual.' This provision was manifestly for Petitioner's benefit—so that he might not violate the terms of the existing agreement with Scherman."

Again in Respondent's brief (p. 15), the argument is made that the burden was on the Petitioner to show that Harry Scherman did not have the power to revest title to the stock in the grantor and that Harry Scherman did have an adverse interest in the disposition of the corpus or income; and Respondent further argues (p. 16) that the reservation as to Scherman was for Petitioner's benefit and that if the trust was an absolute divesting of title the agreement with Scherman could not have been carried out.

Petitioner contends that the said agreement with Scherman referred to in Respondent's brief, being the above first-mentioned agreement of January 27, 1931, does not in any way bear upon or adversely affect Petitioner's contentions in this proceeding and Petitioner's argument in support of that contention will appear in Petitioner's reply brief, but Petitioner, being surprised by the reference to said agreement in

Respondent's brief, deems it necessary in the interest of the
21 Petitioner that this honorable Board have before it in evidence the said first-mentioned agreement of January 27, 1931, as well as the second-mentioned agreement of the same date referred to in the first-mentioned agreement so that said agreements may not be construed adversely to Petitioner by reason of rules as to presumption of fact or burden of proof.

Petitioner is informed that the correctness of the copies of said two agreements of January 27, 1931, hereto attached is not disputed by counsel for Respondent, and, therefore, Petitioner requests that if this motion be granted, an order be made that the said two agreements hereto attached, marked respectively Exhibits 1 and 2, are deemed to be received in evidence in lieu of production of the originals, with the same effect as if they had been so received at the hearing on January 10, 1938.

Petitioner further respectfully requests that if this honorable Board shall fail to grant this motion without further argument, Petitioner be given the opportunity to argue orally in support of this motion.

Respectfully submitted.

GEORGE M. WOLFSON,
Attorney for Petitioner,
165 Broadway, Borough of Manhattan,
New York City.

Dated February 7th, 1938.

Before United States Board of Tax Appeals

Docket No. 88426. Promulgated June 17, 1938

Opinion

Where petitioner created a trust, naming his wife as beneficiary the income therefrom, but did not reserve any power to revoke the trust and the income could not under the terms of the trust instrument be paid to him or accumulated for his future benefit, and, further, where the trust was not established to discharge a legal obligation of petitioner and he did not control the use of the income, held, that the income of the trust was not taxable to petitioner under sections 166 or 167 of the Revenue Act of 1934.

George M. Wolfson, Esq., and Ralph A. McClelland, Esq., for the petitioner.

Arthur W. Carnduff, Esq., for the respondent.

TYSON: This proceeding seeks redetermination of an income tax deficiency of \$1,228.23 for the year 1934, of which amount \$1,224.03 is controversy.

Petitioner assigns error in the respondent's determination that a certain trust established by petitioner was a revocable trust and that petitioner received as taxable income in 1934 the sum of \$8,750, paid dividends on 25 shares of the capital stock of the Book-of-the-Month Club, Inc., which constituted the corpus of that trust.

The petitioner is an individual and a citizen of the United States, residing at Scarsdale, Town of Greenburgh, New York.

On April 8, 1931, the petitioner executed a declaration of trust, in which he, as the owner of 25 shares of the capital stock of Book-of-the-Month Club, Inc., and as the settlor, declared himself the trustee, "to hold the same in trust, to hold, invest, and reinvest the same, to collect the net income therefrom from the date thereof, and to pay the said net income, as and when received by him, to his wife, Helen Martin Wood, until the termination of this trust." The declaration of trust of April 8, 1931, provided, inter alia, that, "this trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate." Upon termination of the trust the property then held in trust would be transferred and delivered to the settlor to be his own property, except that in case of its termination by his death the property would be transferred and delivered to his executors to be disposed of as part of his estate under his last will and testament. A supplementary declaration of trust, executed by petitioner on March 25, 1932, extended the three-year period for the continuance of the trust to a five-year period on April 8, 1931.

The declarations of trust further provided that the settlor might resign as trustee and appoint a substitute trustee; that, without lia-

bility for loss not arising from willful misconduct, the trustee, whether original or substituted, had the power to retain the 25 shares of stock of the Book-of-the-Month Club, Inc., or to sell the same, or any part thereof, to make any investment or reinvestment of the property or money held in trust, to determine the value of the property, "to determine whether any property or money received or
24 held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income," and, further, that the trustee "shall at all times hold and dispose of said twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., subject to the provisions and restrictions of a certain agreement in writing made and dated the 27th day of January 1931, between Harry Scherman and the Settlor, to the same extent, as regards said agreement, as though said stock were held and owned by the Settlor as an individual." That agreement of January 27, 1931, placed certain restrictions upon the petitioner's disposition of his shares of stock of the Book-of-the-Month Club, Inc., by requiring that if he desired to dispose of the stock it should be first offered for sale to Scherman, that the certificates for such stock should bear a suitable legend containing reference to the agreement, and that petitioner should not pledge, mortgage, hypothecate, or otherwise encumber any of the shares without the consent of Scherman.

On April 8, 1931, the petitioner transferred 25 shares of stock of the Book-of-the-Month Club, Inc., to himself as trustee under the above-mentioned declaration of trust and at all times thereafter, and until April 8, 1936, the petitioner, as trustee, continued to hold the stock as the sole corpus of that trust.

After April 8, 1931, and particularly during the year 1934, all dividends paid on the 25 shares of stock of the Book-of-the-Month Club, Inc., were received by petitioner as trustee and deposited by him in a special bank account entitled "Meredith Wood, Trustee," and all income from the trust was paid to Helen Martin Wood, the beneficiary, by checks drawn to her order and signed by the petitioner,
25 as trustee, no part of the income ever being distributed to the grantor or accumulated.

All of the dividends received by petitioner as trustee during the year 1934, amounting to \$8,750, were included in the income-tax return filed by Helen Martin Wood for the year 1934.

The petitioner duly filed his income-tax return for the year 1934 with the collector of internal revenue at the Customs House, Borough of Manhattan, New York, New York, and paid the tax, in the sum of \$1,278.96, shown to be due thereon. The petitioner did not include in that return any income from the above-mentioned trust. The respondent has increased petitioner's income for 1934 by the amount of \$8,750, representing the dividends paid during that year on the 25 shares of stock of the Book-of-the-Month Club, Inc., constituting the corpus of the trust.

The petitioner contends that the income from the trust, in the amount of \$8,750 for the year 1934, constituted taxable income of the beneficiary, Helen Martin Wood. The respondent contends that the income from the trust is taxable to the grantor, petitioner, under the provisions of sections 166 and 167 of the Revenue Act of 1934.¹

26 In *United States v. First National Bank of Birmingham*,
74 Fed. (2d) 360, a trust had been created for a period of one year, which terminated during the taxable year 1929, and the Commissioner contended that the income therefrom was taxable to the grantor during 1929 under section 166 of the Revenue Act of 1928, which provided in part: "Where the grantor of a trust has, at any time during the taxable year, * * * the power to revest in himself title to any part of the corpus of the trust, * * * [italics supplied] then the income therefrom shall be included in the income
27 of the grantor. The court held that the trust was not one such as described by section 166 of the 1928 Act, "as the grantor did not have, at any time during the taxable year 1929, or at any other time, * * * the power to revest in himself title to any part of the corpus of the trust." The court further held that the trust instrument granted an irrevocable estate for years and that the income therefrom was subject to the unfettered command of the grantee and was not taxable to the grantor. The principle of law there announced is that where a trust for a period of years terminates by the terms of the trust instrument, with title to the corpus thereupon revesting in the grantor, such termination is not under the exercise, at any time, of a "power to revest" reserved to the grantor either alone or in conjunction with any person not a beneficiary of the trust, within the meaning of section 166 of the 1928 Act. Since the language in section 166 of the Revenue Act of 1934, applicable in the instant case, differs from that in section 166 of the 1928 Act only by the omission of the words "during the taxable year," and since in the *First National Bank of Birmingham* case the trust did terminate

¹ SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus in computing the net income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (a), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question."

during the taxable year there in question, clearly, the principle there announced is applicable in the instant case.

In neither the original nor the supplementary declaration of trust was any power of revocation reserved to the petitioner or anyone else. The trust could be terminated only upon the happening of one of the three events specified in the original and supplementary declarations, viz, the death of the grantor or of the beneficiary, or the termination of a five-year period from April 8, 1931, and petitioner, the grantor, had no control over the happening of such events. The trust constituted the grant of an estate for years and the beneficiary became the owner of an equitable interest in the corpus.

28 Blair v. Commissioner, 300 U. S. 5. Since section 166, supra, deals only with revocable trusts, and since the trust here in question was not, under the terms of the instruments creating it, revocable at any time during the period fixed for its duration, that section is not applicable in the instant case. Phebe Warren McKean Downs, 36 B. T. A. 1129. Cf. William E. Boeing, 37 B. T. A. 178.

The trust here in question was not established to discharge a legal obligation of the grantor or to pay premiums for insurance on the grantor's life. Thus the principles laid down in such cases as Burnet v. Wells, 289 U. S. 679, and Douglas v. Willcuts, 296 U. S. 1, are not applicable here.

The instruments establishing the trust did not provide for the distribution of any income from the trust to the grantor and none was so distributed. Those instruments, in defining the trustee's duties and powers, gave the trustee the power to determine whether any property or money received or held in trust should be treated as capital or income, but, when considered with the instruments as a whole and the construction given them by the parties, such power may not, in our opinion, be construed as a provision for the accumulation of any income from the trust for future distribution to the grantor. The trust instruments specifically provided that the income should be paid to Helen Martin Wood, the beneficiary, as and when received by the trustee, and all the income was in fact so paid to her and none was distributed to the grantor or accumulated. There is no provision in the trust instruments nor any evidence in the record that it was the intention of the grantor that the income, or any part thereof, was to be used in the discharge of petitioner's marital duty to support his wife, the beneficiary of the trust, and it may not be presumed that the petitioner's gift to his wife was to be used to effectuate that purpose. Shanley v. Bowers, 81 Fed. (2d) 43; Henry A. B. Dunning, 36 B. T. A. 1222.

29 While the petitioner, as trustee, had the power to manage the corpus of the trust, the trust instruments made no provision for his control over the use of the income from the trust and there is no evidence of record that he attempted to exercise any such control. The petitioner did not own that income nor did it remain his in substance, for, under the terms of the grant and for the specified period

of time, the beneficiary had the unfettered right to receive and use the income from the trust corpus. *United States v. First National Bank of Birmingham*, *supra*.

In our opinion, section 167, *supra*, is also clearly not applicable in the instant case. Cf. *Henry A. B. Dunning*, *supra*; *Phebe Warren McKean Downs*, *supra*; *Kaplan v. Commissioner*, 66 Fed. (2d) 401; *William E. Boeing*, *supra*; *E. E. Black*, 36 B. T. A. 346. In *Warren H. Corning*, 36 B. T. A. 301, the income of the trust was accumulated and there was reserved to the grantor a vested power to revoke and amend the trust, and that case is thus clearly distinguished from the instant case on the facts. In *William Lea Taylor*, 37 B. T. A. 875, the trust instrument specifically provided for certain accumulations of income and the distribution of corpus and accumulated income to the grantor upon the termination of the trust, and also reserved in the grantor the power to terminate the trust upon the happening of certain events, which clearly distinguishes that case from the instant case on the facts.

The respondent erred in including the \$8,750 income from the trust in question in the petitioner's taxable income for the year 1934.

Decision will be entered under Rule 50.

[SEAL]

30. Before United States Board of Tax Appeals
Washington

Docket No. 88426

Decision

Pursuant to the Opinion of the Board promulgated June 17, 1938, the respondent herein having on August 5, 1938, filed a proposed recomputation and the petitioner having on August 13, 1938, filed an acquiescence therein, now therefore, it is

Ordered and decided: That there is a deficiency in income tax for the year 1934 in the amount of \$2.60.

Entered Aug. 18, 1938.

Enter:

[SEAL]

(Signed) - JOHN A. TYSON, Member.

31. In United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 88426

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General;

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue; and John W. Smith, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

Jurisdiction

That the Petitioner on Review is the duly appointed, qualified, and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, appointed and holding his office by authority of the laws of the United States; that the Respondent on Review, Meredith Wood, hereinafter referred to as the taxpayer, is an individual residing on Underhill Road, Scarsdale, New York, is an inhabitant of the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit, and filed a Federal income-tax return, Form 1040, for the calendar year 1934, with the Collector of Internal Revenue for the Third New York District, whose office is within the jurisdiction of this Honorable Court; that the court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

Nature of controversy

The nature of the controversy is as follows:

On April 8, 1931, the taxpayer executed a declaration of trust in which he, as owner of 25 shares of stock of the Book-of-the-Month Club, Inc., granted in trust to himself as trustee the said stock, to hold the same, to collect the income therefrom and pay it to his wife as beneficiary. The declaration provided for the continuance of the trust for three years after the date of the instrument or until death of either spouse within that period. It also provided, upon its termination, that the corpus should be transferred to the grantor or his estate. By supplementary declaration dated March 25, 1932, the life of the trust was extended for a period of five years from April 8, 1931. The said 25 shares constituted the sole corpus of the trust. All of the dividends received by the taxpayer as trustee during the year 1934, amounting to \$8,750.00, were paid to his wife, Helen Martin Wood.

On December 21, 1936, the Commissioner mailed to the aforesaid taxpayer a notice of deficiency for Federal income tax for the calendar year 1934, in the amount of \$1,228.23. In arriving at the deficiency in income tax of taxpayer for the year 1934, the Commissioner determined that the trust created by the taxpayer, by an instrument, in writing dated April 8, 1931, was a revocable trust, the income from the corpus of which was taxable wholly to the taxpayer under the provisions of Sections 166 and 167 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Sections 166 and 177).

On March 15, 1937, the taxpayer filed an appeal with the United States Board of Tax Appeals from the Commissioner's determination

of the deficiency as set forth in the notice of deficiency aforesaid, contending that the income from the trust, in the amount of \$8,750.00 received during the year 1934 constituted taxable income to his wife, Helen Martin Wood. The Commissioner filed his answer to the petition on May 8, 1937. The case came on for hearing before the Board on January 10, 1938. On June 17, 1938, the Board promulgated its opinion wherein it held that the trust so created did not provide for the distribution of any of the income therefrom to the grantor (taxpayer) and that none was so distributed; and that in neither the original trust instrument nor the supplemental trust instrument executed by the taxpayer was there reserved to him or anyone else any power of revocation. On August 18, 1938, it entered its final order of redetermination wherein and whereby it ordered and decided that there is a deficiency in income tax for the year 1934 in the amount of \$2.60.

III

Assignments of error

The Commissioner, being aggrieved by the conclusions of law contained in the decision of the United States Board of Tax Appeals and by its order redetermining a deficiency in income tax in the amount of \$2.60 for the calendar year 1934, desires to obtain a review by the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner's assignments of error are as follows:

(1) The Board erred in holding and deciding that the trust created by the taxpayer for the benefit of his wife, with himself as trustee, was not established to discharge a legal obligation of the grantor.

(2) The Board erred in holding and deciding that the trust created by the taxpayer for the benefit of his wife, with himself as trustee, was not revocable at any time during the period fixed for its duration and that the income from the trust was not under the control of the grantor or might be held or accumulated for future distribution of the grantor.

(3) The Board erred in holding and deciding that the income derived from the trust created by the taxpayer for the benefit of his wife, with himself as trustee, was not taxable to the grantor under the provisions of Section 166 or 167 of the Revenue Act of 1934 (48 Stat. 680, U. S. C. Title 26, Sections 166 and 167).

(4) The Board erred in holding and deciding that the income derived from the trust created by the taxpayer for the benefit of his wife, with himself as trustee, constituted taxable income to the beneficiary, Helen Martin Wood.

(5) The Board erred in entering its final order of redetermination that there is a deficiency of \$2.60 in the income tax due from the taxpayer for the year 1934.

(6) The Board erred in failing and refusing to enter a final order of redetermination that there is due from the taxpayer a deficiency in income tax for the year 1934 in the amount of \$1,228.23.

(7) The Board of Tax Appeals erred in that its decision is not supported by and is contrary to the evidence.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed by said Court.

(Signed) JAMES W. MORRIS,
Assistant Attorney General.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

Chief Counsel.

Bureau of Internal Revenue.

Of Counsel:

JOHN W. SMITH,

Special Attorney.

Bureau of Internal Revenue.

26 [Duly sworn to by John W. Smith; jurat omitted in printing.]

37 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Number 88426

Notice of filing petition for review

To MEREDITH WOOD, Esq.,

Underhill Road, Scarsdale, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of November 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of November 1938.

(Signed) J. P. WENCHEL.

R. L. W.

J. P. Wenchel,

Chief Counsel.

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 9th day of November 1938.

(Sgd.) MEREDITH WOOD,

Respondent on Review.

38 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Number 88426

Notice of filing petition for review

To GEORGE M. WOLFSON, Esq.,

165 Broadway, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of November 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of November 1938.

(Signed) J. P. WENCHEL,

R. L. W.,

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this — day of —, 1938.

Attorney for Respondent on Review.

39 Before United States Board of Tax Appeals

B. T. A. Number 88426

Affidavit of service

STATE OF NEW YORK,

County of New York, ss.:

Morris Heier, being first and duly sworn, says:

I am a citizen of the United States of America, over the age of twenty-one years and not a party to or in any way interested in the petition for review to the United States Circuit Court of Appeals for Second Circuit in the case entitled Guy T. Helvering, Commissioner of Internal Revenue, petitioner v. Meredith Wood, respondent, United States Board of Tax Appeals No. 88426.

That, on the 14th day of November 1938, I did personally serve a copy of the said petition for review and also a copy of notice of filing

petition for review on George M. Wolfson, 165 Broadway, New York, N. Y.

(Sgd.) MORRIS HEIER,
Internal Revenue Agent.

Subscribed and sworn to before me this 15th day of November 1938.

(Sgd.) R. D. DONOGHUE,
Internal Revenue Agent.

40

Before United States Board of Tax Appeals

Docket No. 88426

Stipulation of facts dated November 1, 1937

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue and the petitioner, by their respective attorneys, that the following matters shall be taken as true upon the trial of the above-entitled proceeding without other or further proof, and that this stipulation may be received in evidence at the request of either party:

1. That Exhibit B attached to the petition herein is a true copy of the original Declaration of Trust, duly executed by petitioner on the 8th day of April 1931, and referred to in Paragraph IV (1) of the petition herein.

2. That Exhibit C attached to the petition herein is a true copy of the Supplementary Declaration of Trust, duly executed by petitioner on the 25th day of March 1932, and referred to in Paragraph IV (3) of said petition.

3. That after the 8th day of April 1931, and particularly during the year 1934, all dividends paid on the 25 shares of the capital stock of Book-of-the-Month Club, Inc., which constituted the corpus of the trust created by the aforementioned Declaration of Trust and Supplementary Declaration of Trust, were received by the petitioner as Trustee and deposited by him in a special bank account entitled "Meredith Wood, Trustee."

41 4. That all income received from said trust was paid to Helen Martin Wood, the beneficiary, by checks drawn to her order and signed by the petitioner as Trustee.

5. That all of the said dividend received by petitioner as such Trustee during the year 1934, amounting to \$8,750, were included in the income-tax return filed by said Helen Martin Wood for the year 1934.

6. That petitioner has duly paid the tax shown to be due on his income-tax return for the year 1934, as filed, in the sum of \$1,278.96.

7. That petitioner heretofore had a hearing with respect to his 1934 income taxes before C. B. Allen, Esq., Internal Revenue Agent in Charge, 341 Ninth Avenue, New York, N. Y., on August 17, 1936, and has heretofore filed a protest with respect thereto with said Internal

Revenue Agent in Charge, as well as with the Commissioner of Internal Revenue at Washington, D. C.

Dated November 1, 1937.

(Sgd.) GEORGE M. WOLFSON,
(Sgd.) RALPH A. MCCLELLAND,
George M. Wolfson,
Ralph A. McClelland,

Attorneys for Petitioners

(Sgd.) J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

42 *Exhibit B, annexed to stipulation of facts dated November 1, 1937*

DECLARATION OF TRUST

The undersigned, Meredith Wood, of Scarsdale, New York, herein-after called the "Settlor," does hereby acknowledge and declare that he is the owner of twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., a New York corporation, and that he now holds and will continue to hold the same in trust, to hold, invest and reinvest the same, to collect the net income therefrom from the date hereof and to pay the said net income, as and when received by him, to his wife, Helen Martin Wood, until the termination of this trust.

This trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate.

On the termination of the trust by reason of the expiration of said three years or the death of Helen Martin Wood, all property then held in trust hereunder shall be paid, delivered and transferred to the Settlor, to be his own property free of trust. On the termination of the trust by reason of the death of the Settlor, the said trust property shall be paid, delivered and transferred to the executors of the Settlor to be disposed of as part of his estate under his Last Will and Testament.

Any trustee hereunder, whether the Settlor or a substituted trustee, shall have full right and power without liability for loss:

(a) to retain as a trust investment under this instrument the
43 said twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., or to sell the same, or any part thereof, at such time and on such terms as the trustee shall deem proper;

(b) to make from time to time any investment or reinvestment of any of the property or moneys held in trust hereunder, without regard to whether such investment or reinvestment is such an investment or reinvestment as trustees are authorized by law to make or retain in the absence of direction in the trust indenture;

(c) for all purposes of the trust, to fix and determine the value of the property held thereunder and of all parts thereof;

(d) to determine whether any property or money received or held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income, provided, however, that all dividends payable in stock and all rights to subscribe to stock shall be treated as principal.

The trustee, whether the Settlor or a substituted trustee, shall not be held liable for any loss to or diminution of the trust fund not arising from wilful misconduct. While the Settlor is trustee hereunder, no commissions shall be received by him either with respect to principal or income.

The Settlor shall have the right at any time to resign as trustee hereunder for any reason which he shall personally deem sufficient. Such resignation shall be effected by delivering or mailing written notice thereof to Helen Martin Wood. The Settlor shall have power in such case to appoint a substituted trustee by delivering to the person or corporation so appointed a written notification thereof, and by delivering a copy of such notification to Helen Martin Wood.

Anything herein elsewhere contained to the contrary notwithstanding, the trustee, whether the Settlor or a substituted trustee, shall at all times hold and dispose of said twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., subject to the provisions and restrictions of a certain agreement in writing made and dated the 27th day of January, 1931, between Harry Scherman and the Settlor, to the same extent, as regards said agreement, as though said stock were held and owned by the Settlor as an individual; and on the death of the Settlor said stock shall be held and disposed of by his executors as provided in said agreement; and if the Settlor shall during his life again become the beneficial owner of said stock by termination of this trust, he shall hold and dispose of the same as provided in said agreement.

In witness whereof, the Settlor has executed this Declaration of Trust, in duplicate, this 8th day of April, 1931, one of said duplicates being retained by the Settlor and the other delivered to Helen Martin Wood.

STATE OF NEW YORK.

(Sgd.) MEREDITH WOOD. [L. S.]

County of New York, ss.:

On this 8th day of April 1931 before me personally came Meredith Wood, to me known to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[SEAL]

(Sgd.) AUGUSTE M. THIERY,

Auguste M. Thiery,

Notary Public, New York County.

Clerk's No. 46; Register's No. 2T63. Commission expires March 30, 1932.

The undersigned, Harry Scherman, a party to the agreement dated January 27, 1931, referred to in the foregoing instrument, hereby consents that said instrument be executed and delivered.

April 8, 1931.

(Sgd.) HARRY SCHERMAN.

46 *Exhibit C*, annexed to stipulation of facts dated November 1, 1937

SUPPLEMENTARY DECLARATION OF TRUST

Whereas the undersigned, Meredith Wood, of Scarsdale, New York, hereinafter called the "Settlor," did by a written Declaration of Trust dated April 8, 1931, declare himself the Trustee of twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., a New York corporation, for the benefit of the persons and upon the terms and conditions mentioned in said Declaration of Trust; and

Whereas the said Declaration of Trust contains the following provision:

"This trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate,"

Now, therefore, the Settlor does hereby acknowledge and declare that he holds and will continue to hold said twenty-five shares of the capital stock of the Book-of-the-Month Club, Inc., in trust, to hold, invest, and reinvest the same, to collect the net income therefrom and to pay the said net income as and when received by him to his wife, Helen Martin Wood, until the time fixed by this instrument for the termination of this trust. This trust shall continue in effect until (a) the expiration of five years from April 8, 1931, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate.

47 On the termination of the trust by reason of the expiration of said five years or the death of Helen Martin Wood, all property then held in trust hereunder shall be paid, delivered and transferred to the Settlor, to be his own property free of trust. On the termination of the trust by reason of the death of the Settlor, the said trust property shall be paid, delivered, and transferred to the executors of the Settlor to be disposed of as part of his estate under his Last Will and Testament.

Any trustee hereunder, whether the Settlor or a substituted trustee, shall have all the rights and powers that are given to the trustee or any substituted trustee by the said Declaration of Trust dated April 8, 1931, and all of the provisions of said Declaration of Trust, except as herein modified, shall apply to and govern the trust created by this instrument.

In witness whereof, the Settlor has executed this Declaration of Trust in duplicate this 25th day of March 1932, one of said dupli-

ates being retained by the Settlor and the other delivered to Helen Martin Wood.

(Sgd.) MEREDITH WOOD. [L. s.]

48 STATE OF NEW YORK,

County of New York, ss:

On this 25th day of March 1932, before me personally came Meredith Wood, to me known to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[NOTARIAL SEAL]

(Sgd.) SYLVIA WOLLENBERG,

Notary Public.

New York Co. Clk's No. 494. Bronx Co. Clk's No. 128. Term expires March 30, 1932.

The undersigned, Harry Scherman, a party to the agreement dated January 27, 1931, referred to in Declaration of Trust dated April 8, 1931, hereby consents to the execution and delivery of this instrument. March 25, 1932:

(Sgd.) HARRY SCHERMAN.

49

Before United States Board of Tax Appeals

Docket No. 88,426

Stipulation of facts dated February 21, 1938

It is hereby stipulated and agreed between the Petitioner and the Respondent, by their respective attorneys:

1. That the copy agreement dated the 27th day of January 1931, between Harry Scherman and Meredith Wood, annexed as Exhibit 1 to Petitioner's motion for leave to introduce additional evidence herein, dated February 7, 1938, is a full, true and correct copy of the original of said agreement, and of the whole thereof, and that the copy agreement dated the 27th day of January 1931, between Robert K. Haas and Merle S. Haas and Harry Scherman and Bernardine K. Scherman and Meredith Wood, annexed as Exhibit 2 to said motion, is a full, true and correct copy of the original of said agreement, and of the whole thereof.

2. That if Petitioner's said motion of February 7, 1938, be granted, the copies of said agreements attached to said motion shall be, and be deemed to have been, received in evidence herein with the same force and effect as if the originals thereof had been received in evidence at the hearing herein held on the 10th day of January 1938.

Dated: February 21, 1938.

(Sgd.) GEORGE M. WOLFSON,

George M. Wolfson,

Attorney for Petitioner.

(Sgd.) J. P. WENSCH,

Chief Counsel,

Bureau of Internal Revenue.

50 *Exhibit 1, annexed to stipulation of facts dated February 21, 1938*

Memorandum of agreement made the 27th day of January 1931, between Harry Scherman of the Borough of Manhattan, City of New York, party of the first part, hereinafter called "Scherman," and Meredith Wood of Scarsdale, New York, party of the second part, hereinafter called "Wood."

Whereas, the parties hereto, together with Robert K. Haas, Merle S. Haas, and Bernardine K. Scherman, entered into an agreement dated July 18, 1929, containing among other things certain restrictions upon the disposition by Wood of his holdings of shares of stock of Book-of-the-Month Club, Inc.; and

Whereas, the parties to said agreement are about to terminate and cancel the same simultaneously with the execution hereof;

Now, therefore, in order to induce the parties to said agreement of July 18, 1929, to cancel the same, and in consideration thereof, the parties hereto agree as follows:

1. If and whenever Wood shall desire to dispose of all or any part of the stock of Book-of-the-Month Club, Inc., which he may now or hereafter own, he will in each case first offer to sell the same to Scherman at the price and upon the terms which shall be stated in said offer. Each such offer shall remain open for thirty days, and at the expiration thereof Wood shall have the right to sell to any person, firm or corporation whatsoever so much of said stock as shall not be purchased by Scherman, provided (a) that such sale shall not be made at a lower price or on terms more favorable to the
51 buyer than those contained in said offer; (b) that the number of shares so sold shall not be smaller than that so offered and unpurchased and (c) that such sale shall be made and the consideration therefor delivered within three months after the latest date for acceptance of said offer by Scherman. In the event that such sale to others is not so made within said period of three months, the stock so offered for sale shall again become subject to the terms of this agreement.

2. In case of Wood's death, his executors or personal representatives shall within ninety days after their qualification offer all of the stock of said company held by Wood at the time of his death for sale to Scherman, subject to acceptance within thirty days from the date of the offer, at its fair value as at the time of Wood's death. The said offer may be accepted as to all or part of the stock so offered. If the personal representatives of Wood and the offeree cannot agree upon the fair value of said stock, the same shall be determined by three arbitrators, one appointed by each of the parties, and a third chosen by the two so appointed, the decision of the majority of the arbitrators to be conclusive upon all parties. In case of the appointment of arbitrators, the time within which the offer may be accepted shall be reasonably extended so as to allow for their determination.

In the event that any stock so offered shall not be purchased, the personal representatives of Wood shall be free to sell the same without restrictions of any kind.

If the two arbitrators appointed by the parties shall be unable to agree upon a third arbitrator, then the President for the time being of Central Hanover Bank & Trust Company shall act as such third arbitrator, or if he shall be unwilling so to do, shall appoint such third arbitrator.

52 3. Certificates for all stock of said company issued to Wood shall bear a suitable legend thereon containing a reference to this agreement.

4. Wood agrees not to pledge, mortgage, hypothecate, or otherwise encumber any of the shares of said company held by him without the consent of Scherman.

5. All notices, orders, requests, and communications provided for in this agreement shall be in writing and shall be deemed to have been duly given when delivered to the party entitled to receive the same or when mailed by registered mail to said party addressed to him at his last known place of residence.

6. All rights herein granted to Scherman shall enure to the benefit of his executors or personal representatives, and in all other respects except where the context otherwise requires the provisions of this agreement shall bind and benefit the executors and personal representatives of the parties hereto. This agreement is not assignable.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

HARRY SCHERMAN. [L.S.]

MEREDITH WOOD. [L.S.]

JANUARY 27, 1931.

53 Book-of-the-Month Club, Inc., hereby approves the foregoing agreement and acknowledges receipt of a copy thereof.

BOOK-OF-THE-MONTH CLUB, INC.,

By HARRY SCHERMAN, *President*.

Attest:

EDITH WALKER, *Secretary*.

STATE OF NEW YORK.

County of New York, ss.:

On this 27th day of January 1931, before me personally came Harry Scherman, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[NOTARIAL SEAL]

RAYMOND E. COOK.

Notary Public, Queens County.

Clerk's No. 333; Register's No. 389; Certificate filed in New York County, New York County Clerk's No. 20; New York County Register's No. 2C4, Commission expires March 30, 1932.

54 STATE OF NEW YORK.

County of New York, ss.:

On this 27th day of January 1931, before me personally came Meredith Wood, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[NOTARIAL SEAL]

RAYMOND E. COOK,
Notary Public, Queens County.

Clerk's No. 333; Register's No. 389, Certificate filed in New York County, New York County Clerk's No. 20, New York County Register's No. 2C4, Commission expires March 30, 1932.

55 *Exhibit 2, annexed to stipulation of facts dated February 21, 1938*

Memorandum of agreement made the 27th day of January 1931, between Robert K. Haas of Scarsdale, New York, party of the first part, and Merle S. Haas, his wife, of the same place, party of the second part, and Harry Scherman of the Borough of Manhattan, City of New York, party of the third part, and Bernardine K. Scherman, his wife, of the Borough of Manhattan, City of New York, party of the fourth part, and Meredith Wood of Scarsdale, New York, party of the fifth part.

Whereas, the first four parties hereto under date of July 31, 1928, made an agreement restricting the disposition of their holdings of shares of stock of Book-of-the-Month Club, Inc., a New York corporation, and under date of July 18, 1929, an agreement was made between all of the parties hereto modifying in certain respects said agreement of July 31, 1928; and

Whereas, by consent of all of the parties hereto Harry Scherman has acquired or is about to acquire all of the holdings of stock of said corporation of Robert K. Haas and Merle S. Haas;

Now, therefore, in consideration of the premises and of the covenants hereinafter contained, the parties hereto agree as follows:

The aforesaid agreement of July 31, 1928, and the aforesaid modifying agreement of July 18, 1929, and all other agreements between the parties hereto with respect to the disposition of their respective holdings of stock of Book-of-the-Month Club, Inc. (excepting
56 an agreement executed simultaneously herewith between Harry Scherman and Meredith Wood) are hereby terminated and cancelled as of this date.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

BERNARDINE K. SCHERMAN.	[L. S.]
MERLE S. HAAS.	[L. S.]
ROBERT K. HAAS.	[L. S.]
HARRY SCHERMAN.	[L. S.]
MEREDITH WOOD.	[L. S.]

57 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 88426

Praeceptum for record

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of all proceedings before the Board.
2. Pleadings before the Board.
 - (a) Petition including annexed copy of deficiency letter.
 - (b) Answer.
 - (c) Motion for leave to introduce additional evidence.
3. Findings of fact, opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and service of a copy of petition for review.
- 58 5. Stipulation of facts filed January 10, 1938, with exhibits B and C attached to the petition.
6. Stipulation of additional facts filed March 4, 1938, with exhibits 1 and 2 attached to motion for leave to introduce additional evidence.
7. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
8. This praecipe.

(Sgd.) J. P. WENCHEL.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 18th day of January 1939. Agreed to:

(Sgd.) GEORGE M. WOLFSON,

Attorney for the Respondent.

JWS mtr.

59 [Clerk's certificate to foregoing transcript omitted in printing.]

60 In United States Circuit Court of Appeals for the Second
Circuit

No. 310—October Term 1938

Argued May 3, 1939. Decided May 29, 1939

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MEREDITH WOOD, RESPONDENT

Appeal from the Board of Tax Appeals

Before L. HAND, CHASE, and PATTERSON, *Circuit Judges*

On petition to review the decision of the United States Board of
Tax Appeals.

L. W. Post, Sp. Asst. to Atty. Gen., for petitioner.

George M. Wolfson, of New York City, for respondent.

Opinion

PER CURIAM.

Order affirmed on authority of United States v. First National Bank
of Birmingham, 5 Cir., 74 F. (2d) 360.

61 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MEREDITH WOOD, RESPONDENT

Judgment

Filed June 16, 1939

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the
United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and
decreed that the order of said United States Board of Tax Appeals
be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in
accordance with this decree.

ing.]

WM. PARKIN, *Clerk*.

62 [File endorsement omitted.]

63 [Clerk's certificate to foregoing transcript omitted in printing.]

64 Supreme Court of the United States

Order allowing certiorari

Filed November 6, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 43791. U. S. Circuit Court of Appeals, Second Circuit. Term No. 384. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. Meredith Wood. Petition for a writ of certiorari and exhibit thereto. Filed September 13, 1939. Term No. 384 O. T. 1939.

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No. 384

In the Supreme Court of the United States

OCTOBER TERM, 1939

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

v.

MEREDITH WOOD

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

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CITATIONS

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(I)

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

v.

MEREDITH WOOD

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled cause on June 16, 1939, affirming the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 22-29) is reported in 37 B. T. A. 1065. The opinion of the Circuit Court of Appeals is reported in 104 F. (2d) 1013.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 16, 1939. (R. 60.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer in 1931 declared himself trustee of certain property for a period of three years (later extended to five years from the original date) or until death of either himself or his wife within that period. During the continuance of the trust, the net income was to be paid to the taxpayer's wife and upon termination the corpus was to remain his or to be transferred to his estate. Is he taxable upon the trust income thus paid to his wife in 1934?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are printed in the Appendix, *infra*, pp. 7-13.

STATEMENT

The material facts as stipulated (R. 40-56) and found by the Board of Tax Appeals (R. 22-25) are as follows:

The taxpayer resides at Scarsdale, New York. (R. 22.) On April 8, 1931, he executed a declaration of trust in which he, as the owner of 25 shares

of the capital stock of Book of the Month Club, Inc., declared himself trustee, "to hold the same In Trust, to hold, invest and reinvest the same, to collect the net income therefrom from the date hereof and to pay the said net income, as and when received by him, to his wife, Helen Martin Wood, until the termination of this trust." (R. 23.)

The declaration of trust provided, *inter alia*, that the trust should continue in effect until (a) the expiration of three years from the date of the instrument, or (b) the death of the settlor, or (c) the death of Helen Martin Wood, whichever event should first happen. Upon termination the property was to be transferred to the settlor to be his own, except that in case of termination of the trust by his death the property would go to his executors to be disposed of as part of his estate. A supplementary declaration of trust, executed on March 25, 1932, extended the three-year period for the continuance of the trust to a five-year period from April 8, 1931. (R. 23.)

The declarations of trust provided that the settlor might "determine whether any property or money received or held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income." (R. 23-24.)

Although there were provisions for a substitute trustee and power to dispose of the corpus under

specified conditions (R. 23-24), the taxpayer at all times after the creation of the trust and until April 8, 1936, continued as trustee to hold the stock as the sole corpus. (R. 24.)

After April 8, 1931, and during the year 1934, all dividends paid on the stock were received by taxpayer as trustee, deposited by him in a special bank account, and paid over to his wife. (R. 24-25.)

The taxpayer duly filed his income tax return for the year 1934 and paid the tax shown to be due thereon, failing, however, to include the trust income, which amounted to \$8,750. The Commissioner increased the taxpayer's income for 1934 by that amount. (R. 25.) Upon review, the Board of Tax Appeals held that such action of the Commissioner was erroneous and the court below affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In failing to hold that the trust income here involved is taxable under Section 166 of the Revenue Act of 1934.

(2) In failing to hold that Article 166-1 of Treasury Regulations 86 constitutes a valid construction of the Revenue Act of 1934 as applied to the facts of this case.

(3) In failing to hold that the income involved is taxable to respondent under Section 22 (a) of the Revenue Act of 1934.

(4) In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

The issues here presented are likewise involved in *Helvering v. Clifford*, in which a petition for a writ of certiorari is being filed herewith. Reference is here made to the petition in that case for the reasons which call for review of these issues.

In certain particulars, the instant case presents facts that even more strikingly call for the application of Section 166 of the Revenue Act of 1934 and Article 166-1 of Regulations 86, promulgated thereunder. The *Clifford* case involves a five-year trust created during the tax year. Here, the trust was established in 1931 to last for three years, and amended in 1932 to last for five years from the original date. It was thus never substantially more than a four-year trust, and, at the end of the tax year 1934, it was less than a sixteen-month trust. Moreover, the taxpayer undertook to reserve the right to determine whether any property or money received by the trust should be treated as capital or income (R. 23-24), thus retaining the power to distribute income to his wife or to retain it for himself.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

SEPTEMBER 1939.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) General Definition.—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * (U. S. C., Title 26, Sec. 22.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (c), relating to the so-called "charitable contribution" deduction); then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question." (U. S. C., Title 26, Sec. 167.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 166-1 [as amended by T. D. 4629, XV-1 Cum. Bull. 140, 141 (1936), and T. D. 4759, 1937-2 Cum. Bull. 117, 118].
Trusts, with respect to the corpus of which,

the grantor is regarded as remaining in substance the owner.—(a) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this article the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus or the income therefrom adverse to the grantor, or both, may cause the title to the corpus to revest in the grantor. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless of—

(1) whether such power or ability to re-take the trust corpus to the grantor's own use is effected by means of a power to revoke, to terminate, to alter or amend or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revest in the grantor in possession

and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain to come;

(4) whether the power to re-vest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those

which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(c) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the ab-

sence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revest in himself in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

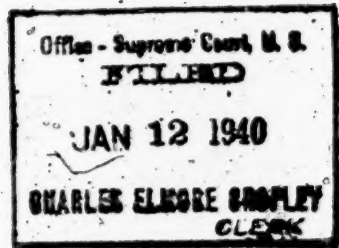
(d). If the grantor is regarded as remaining in substance the owner of the corpus the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

If the grantor strips himself of the substantial incidents or attributes of ownership in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof

realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to re-vest title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

FILE COPY



No. 384

In the Supreme Court of the United States

OCTOBER TERM, 1939

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

v. ,

MEREDITH WOOD

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE PETITIONER

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CITATIONS

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<i>Douglas v. Willcuts</i> , 296 U. S. 1	7
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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 384

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER.**

v.

MEREDITH WOOD.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 11-15) is reported in 37 B. T. A. 1065. The *per curiam* opinion of the Circuit Court of Appeals (R. 29) is reported in 104 F. (2d) 1013.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 16, 1939 (R. 29). The petition for a writ of certiorari was filed September 13, 1939, and was granted November 6, 1939 (R. 30). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer in 1931 declared himself trustee of certain property for a period of three years (later extended to five years from the original date) or until the earlier death of either himself or his wife. During the continuance of the trust, the net income was to be paid to the taxpayer's wife, and upon termination the corpus was to remain his or to be transferred to his estate. The question presented is whether the net income of the trust for 1934 was properly included in the taxpayer's gross income.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix to the brief for the petitioner in *Helvering v. Clifford*, No. 383, this Term, pp. 30-38.

STATEMENT

The facts as stipulated (R. 20-27) and as found by the Board of Tax Appeals (R. 11-12) may be summarized as follows:

On April 8, 1931, respondent, a resident of New York, declared himself trustee for the benefit of his wife of 25 shares of the capital stock of Book of the Month Club, Inc., which he owned (R. 11). The trust was to terminate upon the expiration of three years or upon the earlier death of respondent or his wife. Upon termination the corpus was to be transferred to the respondent to be his own, except that in the case of termination of the trust by his death the property was to go to his executors to be disposed of as part of his estate. A supplementary declaration of trust executed

on March 25, 1932, extended the three-year period for the life of the trust to a five-year period from April 8, 1931 (R. 11).

The declaration of trust provided that all net income from the trust estate should be paid to respondent's wife as and when received (R. 11). Respondent, however, retained full control over the corpus of the estate. Thus, as trustee, he had the power to retain the 25 shares of stock of the Book of the Month Club, Inc., or to sell them at such times and on such terms as he deemed proper (R. 12). In the case of sale, he could invest the proceeds without limitation of laws pertaining to the investment of trust funds. Moreover, he had the power "to determine whether any property or money received or held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income" (R. 12). He exonerated himself from any liability except for "willful misconduct" (*id.*).

Although there were provisions for respondent appointing a substitute trustee (R. 11), respondent at all

¹This power was, however, qualified by the subsequent provision of the trust deed that the trustee should hold and dispose of the shares of stock of the Book of the Month Club, Inc., subject to the provisions of an agreement dated January 27, 1931, between respondent and one Harry Scherman "to the same extent, as regards said agreement, as though said stock were held and owned by the Settlor as an individual." The agreement referred to provided that if respondent desired to dispose of the stock, he should first offer it for sale to Scherman, that the certificates should bear a suitable legend containing reference to the agreement, and that respondent should not pledge, mortgage, hypothecate, or otherwise encumber any of the shares without the consent of Scherman (R. 12).

times after the creation of the trust and until it terminated on April 8, 1936, remained as trustee and continued to hold the Book of the Month Club, Inc., stock as the sole corpus (R. 12). All dividends paid on the stock were received by the respondent as trustee, deposited by him in a special account, and paid over to his wife by checks drawn to her order and signed by him as trustee (R. 12). No part of the income was distributed to the grantor or accumulated (*id.*).

Respondent duly filed his income-tax return for the year 1934 and paid the tax shown to be due thereon, failing, however, to include the trust income, which amounted to \$8,750. The Commissioner increased the taxpayer's income for 1934 by that amount (R. 12). Upon review, the Board of Tax Appeals held that this action of the Commissioner was erroneous and the court below affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

- (1) In failing to hold that the income involved was taxable to respondent under Section 22 (a) of the Revenue Act of 1934.
- (2) In failing to hold that the income involved was taxable to the respondent under Section 166 of the Revenue Act of 1934.
- (3) In failing to hold that Article 166-1 of Treasury Regulations 86 constitutes a valid construction of the Revenue Act of 1934 as applied to the facts of this case.
- (4) In affirming the decision of the Board of Tax Appeals.

ARGUMENT

This case presents the same issues as those involved in *Helvering v. Clifford*, No. 383, present Term, which is to be argued with this case. Reference is made to the Government's brief in the *Clifford* case for the arguments in support of the Government's position here.

1. Although the powers retained by the grantor as trustee were slightly more extensive in the *Clifford* case than they are here, in other particulars the facts of the present case even more strikingly call for the application of Article 166-1 of Regulations 86, promulgated under the Revenue Act of 1934. If the precise period of the trust should be material, it may be noted that while the *Clifford* case involves a five-year trust created during the tax year, here the trust was established in 1931 to last for three years, and was amended in 1932 to last for five years from the original date. It was thus never substantially more than a four-year trust and, at the end of the tax year 1934, it was less than a 16-month trust. Moreover, the taxpayer undertook to reserve the right to determine whether any property or money received by the trust should be treated as capital or income (R. 12). It may be that this reservation was intended to apply only to doubtful items such as extraordinary dividends (cf. *Matter of Osborne*, 209 N. Y. 450; *Equitable Trust Co. v. Prentice*, 250 N. Y. 1; *Commissioner v. Waterbury*, 97 F. (2d)

Thus, the respondent had no discretion to accumulate the net income but was required to distribute it to his wife as received and the trust deed contained no provisions exempting the income from being charged for the debts of the wife.

383 (C. C. A. 2d), certiorari denied, 305 U. S. 638) and the retention of ordinary income in capital account might be a violation of the New York law against accumulations (New York Personal Property Law, Section 16). Nevertheless the taxpayer, as a practical matter, might have employed the power thus reserved to retain income for himself, for presumably his wife would not have objected had he done so. Cf. *Rollins v. Helvering*, 92 F. (2d) 390, 394 (C. C. A. 8th), certiorari denied, 302 U. S. 763; *Kaplan v. Commissioner*, 66 F. (2d) 401 (C. C. A. 1st).

2. Respondent suggested in his brief in opposition to the petition for certiorari that petitioner may not be heard to urge that the trust income is taxable to the respondent under Section 22 (a) of the Revenue Act of 1934 because the point was not raised below. We concede that the Government's brief in the court below expressly waived reliance upon any section other than Section 166. But this is not a case where reversal is asked upon an issue not presented to the lower court or, indeed, upon a theory not argued to that court. As pointed out in our brief in the *Clifford* case (pp. 8-9), Section 166 merely defines with particularity some of the instances in which the grantor of a trust is regarded as in substance the owner of the corpus and therefore as properly taxable on the trust income under Section 22 (a). Whichever section be involved, the factual issues are identical and the legal arguments substantially similar. It would require a remarkably narrow focussing of the court's attention if it were able to decide the issue under Section 166 without simultaneous consideration of the effect of the provisions of Section

22 (a). The similarity, both in principal and in consequences, of the tax theory underlying Sections 22 (a) and 166 is illustrated by the fact that the Board,³ the Government's brief in the Circuit Court of Appeals,⁴ and the authority upon which the court below decided the case,⁵ each consider the argument under Section 22 (a).

We have no quarrel with the rule that reversal cannot ordinarily be sought upon a *ground* not urged below.

³ The opinion in two places answers arguments that seem necessarily based upon Section 22 (a). It states that "the trust here in question was not established to discharge a legal obligation of the grantor," so that *Douglas v. Willcuts*, 296 U. S. 1, is inapplicable (R. 14). Again, it concludes that "the petitioner did not own that income nor did it remain his in substance" (R. 14-15).

⁴ The brief read (pp. 13-14):

"Viewed in this light, it is thought that the instant case is substantially similar to cases holding that the assignment of future income from services to be performed or property retained by the assignor does not relieve him from tax. *Lucas v. Earl*, 281 U. S. 111; *Burnet v. Leininger*, 286 U. S. 136; see *Reinecke v. Smith*, 289 U. S. 172, 177; cf. *Matchette v. Helvering*, 81 F. (2d) 73 (C. C. A. 2d). It is thought that the taxpayer here remained in substance the owner of the trust property so that the tax in the instant case was properly imposed upon him by virtue of such ownership (see *Blair v. Commissioner*, *supra*, p. 12; cf. *Poe v. Seaborn*, 282 U. S. 101) even though he may have assigned certain income rights with respect thereto. See *Reinecke v. Smith*, *supra*."

⁵ *United States v. First National Bank of Birmingham*, 74 F. (2d) 360 (C. C. A. 5th). The opinion states (p. 362):

"* * * The thing granted being the estate or property interest which produced the income in question, not future income earned by the grantor or settlor or produced by property which he continued to own, rulings such as those made in the cases of *Lucas v. Earl*, 281 U. S. 111, 50 S. Ct. 241, 71 L. Ed. 731, and *Burnet v. Leininger*, 286 U. S. 136, 52 S. Ct. 345, 76 L. Ed. 665, are not applicable."

But that salutary rule of judicial administration cannot, of course, be pressed so far as to preclude new supporting reasons for the position taken by the petitioner; any such rule would require, in effect, that this Court decide its important issues upon briefs and arguments which have only literary differences from those presented below. The question is plainly one of degree. Where no injustice is done the respondent, he cannot ask this Court to sanction an erroneous result through a pedantic adherence to what might be called the canons of appellate pleading. Plainly enough, in this case, respondent will not be prejudiced if Section 22 (a) is considered by this Court for the first time. Compare *Helvering v. Gregory*, 69 F. (2d) 809 (C. C. A. 2d) affirmed, *Gregory v. Helvering*, 293 U. S. 465; *Erie R. Co. v. Tompkins*, 304 U. S. 64.

CONCLUSION

The judgment of the court below should be reversed.
Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
WARNER W. GARDNER,
L. W. POST,

Special Assistants to the Attorney General.

RICHARD H. DEMUTH,
Special Attorney.

JANUARY 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 384.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

MEREDITH WOOD,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.**

RALPH S. ROUNDS,
GEORGE M. WOLFSON,
Attorneys for Respondent,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 384.

GUY T. HELVERING, COMMISSIONER
OF INTERNAL REVENUE,
Petitioner,

v.

MEREDITH WOOD,
Respondent.

BRIEF IN OPPOSITION TO PETITION.

Reference to the official reports of the opinions below and to the grounds upon which petitioner invokes the jurisdiction of this Court will be found in the petition (pp. 1, 2).

Statement of the Case.

Respondent, a resident of Scarsdale, New York, by declaration of trust, executed April 8, 1931, and amended by supplementary declaration of trust on March 25, 1932, created a trust expiring at the termination of a fixed period of five years, or the prior death of the respondent or his wife, with the income payable to respondent's wife during the existence of the trust, the principal of the trust at the

expiration thereof reverting to the respondent or his estate. The trust contained no powers of revocation (Rec., pp. 42 to 47).

The trust instrument, which was short, gave to the trustee (who was the respondent) certain formal powers usually found in trusts executed under the laws of New York. These powers were

(a) To retain as a trust investment, or to sell, the Book-of-the Month Club Inc. stock originally constituting the corpus of the trust;

(b) To make investments or reinvestments in so-called "non-legal" securities;

(c) For purposes of the trust, to fix and determine the value of property held thereunder;

(d) To determine whether properties or moneys received should be treated as capital or income and the method of allocating expense as between them, except that stock dividends and rights to subscribe to stock were to be treated as capital (Rec., pp. 42-43).

There were also provisions for substitution of trustee. The trust expired on April 8, 1936 (Rec., p. 46). The income from the trust during 1934, the taxable year here in question, was received by the respondent as trustee, deposited in a special account, and was in its entirety turned over by him to the beneficiary. During the whole period of the trust the income was received and paid out in the same manner (Rec., pp. 24, 25).

The narrow question involved is whether such income should be taxable to the respondent instead of to the income beneficiary.

The Commissioner increased the respondent's income for 1934 by the amount of the dividends on the stock held in trust received during that year, and contended before the Board of Tax Appeals that such income was taxable to the respondent under Sections 166 and 167 of the Revenue Act of 1934 (Rec., p. 25). The Board of Tax Appeals held that such action of the Commissioner was erroneous (37 B. T. A. 1065). On appeal to the Circuit Court of Appeals for the Second Circuit, the Commissioner expressly abandoned his contention under Section 167 of the Revenue Act of 1934 and in his brief stated that the question presented was whether the taxpayer was "taxable under Section 166 of the Revenue Act of 1934 upon trust income paid to his wife as beneficiary" (Pet. br., C. C. A., p. 2). In his said brief petitioner further stated that "the Commissioner bases this appeal solely on the question whether or not such income is taxable under Section 166 of the 1934 Act" (Pet. br., C. C. A., p. 5). Said Section 166 of the Revenue Act of 1934 reads as follows:

"SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested:

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor."

The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals (104 F. (2d) 1013) upon the authority of *United States v. First National Bank of Birmingham*, 74 F. (2d) 360 (C. C. A. 5th):

The petitioner now urges in support of this petition a contention not previously made in the case, to wit: that the courts below erred in failing to hold that the income from the trust is taxable to respondent under Section 22 (a) of the Revenue Act of 1934 which defines "gross income" in general terms (Petition, pp. 5, 7).

Summary of Argument.

Respondent contended below and contends here that the reversionary interest of the respondent does not constitute a power to revest in the respondent title to any part of the corpus of the trust within the meaning of Section 166 of the Revenue Act of 1934; that neither in the trust instrument nor as a result of any rule of law did the settlor or any other person have a power of revocation or right to dispose of the corpus of the trust at any time during its existence; that to the extent that Article 166-1 of Regulations 86 as amended (Petition, Appendix, pp. 8 to 13) may be held to construe Section 166 of the Revenue Act otherwise, said regulation is invalid; that if Section 166 of the Revenue Act of 1934 were to be construed as taxing the income from this trust to the settlor, its constitutionality would be doubtful as taxing to one person income belonging to, and received by, another.

Respondent further contends that the income from the trust is not taxable to respondent under Section 22 (a) of the Revenue Act of 1934, and further that this point is not available to petitioner here, as it was not raised below.

ARGUMENT.

POINT I.

Respondent had no "power to revest" in himself "title to any part of the corpus of the trust".

Petitioner has confused a "power to revest" with an ordinary right of reversion.

Under New York law respondent had no right of revocation, or "revesting", since none was contained in the declaration of trust.

New York Personal Property Law, Section 23;
Schoellkopf v. Marine Trust Co., 267 N. Y. 358,
361.

A reversionary interest can under no circumstances be construed as a power to revest. A power imports ability on the part of the possessor thereof to exercise an act of will. A reversion is a property right. During the existence of this trust respondent retained none of the incidents of ownership of the property. The well reasoned opinion of the Board of Tax Appeals herein, as affirmed by the Circuit Court of Appeals, finds ample support in numerous decisions of lower courts.

United States v. First National Bank of Birmingham, 74 F. (2d) 360 (C. C. A., 5th);
Shanley v. Bowers, 81 F. (2d) 13 (C. C. A., 2nd);
• *Clifford v. Helvering*, 105 F. (2d) 586 (C. C. A., 8th);
Knapp v. Hocy, 104 F. (2d) 99 (C. C. A., 2nd);

Downs v. Commissioner, 36 B. T. A. 1129;

Rovensky v. Commissioner, 37 B. T. A. 702;

Hormell v. Commissioner, 39 B. T. A., No. 37.

Although the precise question would appear not to have been decided by this Court, it is submitted that the question is neither difficult nor important nor in conflict with any applicable decisions of this Court, nor has there been any conflict between the circuits with regard thereto.

Petitioner places some emphasis upon the right of the trustee (who was, during the continuance of the trust, respondent) to determine whether property or money received from the trust should be treated as capital or income. But this is a customary provision in New York trusts, as are the other formal provisions above quoted. Any one familiar with the difficulty which the New York Court of Appeals has had in dealing with the problem of allocating extraordinary dividends and unusual distributions as between principal and income will understand why draftsmen of New York trusts customarily attempt to obviate this fruitful source of litigation. (See *Matter of Osborne*, 209 N. Y. 450; *Equitable Trust Co. v. Prentice*, 250 N. Y. 1.) It should be further noted that a retention of any actual income in principal account would violate the New York statute regarding accumulations (N. Y. Pers. Prop. L., sec. 16). The fact is, as above stated, that all income was paid to the beneficiary.

The petition in the *Clifford* case (No. 383), which is incorporated by reference in this proceeding (Petition, p. 5), places a good deal of reliance upon *DuPont v. Commissioner*, 289 U. S. 685 (Petition; *Clifford* case, p. 7), where this Court was considering the constitutionality of a provision in the Revenue Act of 1924 which provided that

premiums for insurance on the life of the grantor, that part of the income of the trust should be included in the grantor's income for tax purposes, and held said statute to be constitutional. It should be noted, however, that in the companion case of *Burnet v. Wells*, 289 U. S. 670, Mr. Justice Cardozo was careful to distinguish life insurance premium trusts from trusts such as that in the instant case, stating at pages 681-682:

"Trusts for the preservation of policies of insurance involve a continuing exercise by the settlor of a power to direct the application of the income along predetermined channels. In this they are to be distinguished from trusts where the income of a fund, though payable to wife or kin, may be expended by the beneficiaries without restraint, may be given away or squandered, the founder of the trust doing nothing to impose his will upon the use."

The mere statement of petitioner's argument that a reversion is the same as a "power to revest" during the continuance of the trust would seem to bear its own refutation.

POINT II.

To the extent that Article 166-1 of Regulations 86 as amended by T. D. 4629, requires the taxation of the income from this trust as income of respondent, the said Article is invalid.

The Treasury regulation relied on by petitioner (Petition, pp. 8 to 13) obviously goes far beyond the language of Section 166. The petitioner contends that since the Revenue Acts of 1936 and 1938 are similar to the Revenue Act

of 1934, this regulation has ripened into legislative fiat (Petition, *Clifford* case, p. 7). But this argument is without substance. The legislative power is vested solely in the Congress, and this Court has held that treasury regulations cannot go beyond the taxing statute.

Koshland v. Helvering, 298 U. S. 441, 445;

Blatt Co. v. United States, 305 U. S. 267, 279.

There is no ambiguity in the meaning of Section 166, which requires clarification by Treasury decision.

Nor is there anything in Section 22 (a) of the Revenue Act of 1934 which would justify the provisions of Treasury Regulations 86 relied on by petitioner, but in any case petitioner will not be heard to urge the point at this stage of the litigation, not having raised the point below.

Blair v. Oesterlein Co., 275 U. S. 220, 225;

Van Huffel v. Harkelrode, 284 U. S. 225, 229;

Burnet v. Commonwealth Imp. Co., 287 U. S. 415, 418.

POINT III.

If Section 166 (or any other provision of the 1934 Act) had the effect of taxing income from this trust to respondent, its constitutionality would be doubtful.

Respondent submits that Section 166 cannot, except by the most strained construction of language, be construed so as to render the income from this trust taxable to respondent.

Respondent further submits that were the statute to be construed as desired by petitioner, its constitutionality

would be seriously imperilled. Congress has no authority to tax to one person the income of another.

Blair v. Commissioner, 300 U. S. 5;

Hooper v. Tax Commission of Wisconsin, 284 U. S. 206, 215.

"That which is not in fact the taxpayer's income cannot be made such by calling it income."

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

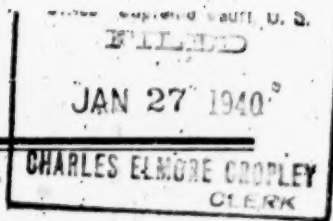
RALPH S. ROUNDS,

GEORGE M. WOLFSON,

Attorneys for Respondent.

October, 1939.

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IN THE

• **Supreme Court of the United States**

OCTOBER TERM, 1939.

— • • —
No. 384.
— • • —

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

MEREDITH WOOD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

GEORGE M. WOLFSON,
Attorney for Respondent.

DEAN G. ACHESON,
Of Counsel.

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MEREDITH WOOD,
Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.*

BRIEF FOR THE RESPONDENT.

Opinions Below. Jurisdiction.

The opinion of the Board of Tax Appeals is reported in 37 B. T. A. 1065 (Rec., pp. 11-15). The opinion of the Circuit Court of Appeals is reported in 104 F. (2d) 1013 (Rec., p. 29). The case is here on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (Rec., p. 30).

Question Presented.

Is respondent taxable under Section 166 of the Revenue Act of 1934, upon trust income paid during 1934 to his wife as the beneficiary of a three year trust created by declaration of trust executed by respondent in April, 1931

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TRADE

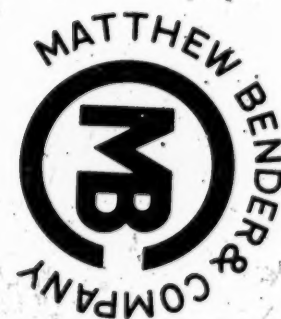
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(said period being extended to five years from the original date by supplementary declaration of trust executed in March, 1932), pursuant to the provisions of which, at the expiration of the five year period or the prior death of respondent or his wife, the corpus of the trust was to revert to the respondent or his estate.

Statutes and Regulations.

Certain of the statutes and regulations hereinbelow referred to are printed in the appendix, *infra*, pp. 34 to 40.

Statement of the Case.

Meredith Wood, the respondent, a resident of Scarsdale, New York, by declaration of trust executed April 8, 1931 created a trust expiring at the termination of a fixed period of three years, or the prior death of the respondent or his wife, with the income payable to respondent's wife during the existence of the trust, the principal of the trust at the expiration thereof reverting to the respondent or his estate (Rec., pp. 21-23).

Thereafter on March 25, 1932 the respondent by supplementary declaration of trust extended the period of three years to a period of five years so that the trust continued in effect until the expiration of five years from April 8, 1931 or the death of respondent or his wife, whichever event should first happen, with reversion to the respondent or his estate (Rec., pp. 23, 24).

Hereinafter reference to the trust or trust instrument will be understood to mean the original trust instrument as modified by the supplementary declaration of trust.

The trust terminated on April 8, 1936 by reason of the expiration of the five-year period (Rec., pp. 4, 12).

The trust contained no power of revocation or any power on the part of any one to revest in the grantor at any time title to any part of the corpus of the trust. The grantor's sole rights in that corpus were the reversionary rights above described.

The trust instrument, which was short, gave to the trustee (who was the respondent) certain formal powers usually found in trusts executed under the laws of New York. These powers were:

(a) To retain as a trust investment, or to sell, the Book-of-the-Month Club, Inc. stock originally constituting the corpus of the trust;

(b) To make investments or reinvestments in so-called "non-legal" securities;

(c) For purposes of the trust, to fix and determine the value of property held thereunder;

(d) To determine whether properties or moneys received should be treated as capital or income and the method of allocating expense as between them, except that stock dividends and rights to subscribe to stock were to be treated as capital (Rec., pp. 21, 22).

There were also provisions for substitution of trustee and any substituted trustee was given the same powers which were given to the settlor as trustee (Rec., pp. 21, 22).

The income from the trust during 1934, the taxable year in question, was received by the respondent as trustee, deposited in a special account, and was in its entirety turned over by him to the beneficiary. During the entire period of the trust the income was received and paid out in the same manner (Rec., pp. 12, 20).

The Commissioner increased the respondent's income for 1934 by the amount of the dividends received during that

year on the stock held in trust (Rec., pp. 6, 7); and contended before the Board of Tax Appeals that such income was taxable to the respondent under Sections 166 and 167 of the Revenue Act of 1934 (Rec., p. 13). The Board of Tax Appeals held that such action of the Commissioner was erroneous (37 B. T. A. 1065; Rec., pp. 11-15). On appeal to the Circuit Court of Appeals for the Second Circuit, the Commissioner expressly abandoned his contention under Section 167 of the Revenue Act of 1934 and in his brief stated that the question presented was whether the taxpayer was "taxable under Section 166 of the Revenue Act of 1934 upon trust income paid to his wife as beneficiary" (Petitioner's brief, C. C. A., p. 2; copy filed herein with respondent's brief opposing application for certiorari). In his said brief petitioner further stated that "the Commissioner bases this appeal solely on the question whether or not such income is taxable under Section 166 of the 1934 Act" (*Id.*, p. 5). Said Section 166 of the Revenue Act of 1934 reads as follows:

"SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested:

(1) in the grantor, either alone, or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals (104 F. (2d) 1013; Rec., p. 29), its opinion consisting of the following *per curiam* memorandum:

“Order affirmed on authority of *United States v. First National Bank of Birmingham*, 5 Cir., 74 F. (2d) 360.”

Petitioner urges here the same points that were made by him before the Circuit Court of Appeals and in addition makes a contention not previously made in the case, to wit, that the Court below erred in failing to hold that the income from the trust is taxable to respondent under Section 22(a) of the Revenue Act of 1934 (*infra*, p. 34), which defines gross income in general terms (Pet. Br., p. 4).

Summary of Argument.

Respondent contends:

That the reversionary interest of respondent did not constitute a power to revest in the respondent title to any part of the corpus of the trust within the meaning of Section 166 of the Revenue Act of 1934, and that neither respondent nor any other person or combination of persons specified in Section 166 at any time had such power, either by virtue of the provisions of the trust instrument or as the result of any rule of law; that if there were doubt as to the meaning of Section 166, its legislative history would necessitate a construction as above set forth.

That to the extent that Article 166-1 of Regulations 86 as amended (*infra*, pp. 34-38) may be held to construe Section 166 of the Revenue Act otherwise, said regulation is invalid.

That petitioner should not be heard at this stage of the litigation to urge that Section 22(a) of the Revenue Act of 1934 or any provision of that act other than Section 166 thereof requires the income of this trust to be taxed as income of the respondent.

That in any case, neither Section 22(a) nor any other provision of the Revenue Act of 1934 would justify the taxing of the income from this trust to respondent.

That if Section 166 or 22(a) or any other provision of the Revenue Act of 1934 were to be construed as taxing the income from this trust to the respondent, its constitutionality would be imperilled in that it would tax to one person income belonging to and received by another.

ARGUMENT.

POINT I.

Neither respondent, nor any person or combination of persons specified in Section 166 had the "power to revest" in respondent "title to any part of the corpus of the trust".

Mr. Wood is a resident of New York (Rec., pp. 2, 11) and the trust was executed in New York (Rec., pp. 22, 24) and is governed by the laws of New York (*Blair v. Commissioner*, 300 U. S. 5, 9, 10). In this trust there was no power to revest, ordinarily known as a power of revocation, and under the applicable authorities no such power can be implied. Section 23 of the New York Personal Property Law provides the only method of accomplishing a revocation of such a trust under New York Law. That section reads as follows:

“§23. REVOCATION OF TRUSTS UPON CONSENT OF ALL PERSONS INTERESTED.

Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.”

In *Schoellkopf v. Marine Trust Company*, 267 N. Y. 358, the Court states, by Lehman, J., page 361:

“The settlor has attempted to revoke the trust. He has not in the trust indenture reserved any right of revocation, and he has parted with all his title to the trust property. He can revoke the trust only ‘upon the written consent of all the persons beneficially interested’ therein, given in accordance with the provisions of section 23 of the Personal Property Law (Cons. Laws, ch. 41).”

Under the declaration of trust as amended the beneficiary was the absolute owner of the income and the respondent had no rights therein (*Schoellkopf v. Marine Trust Company*, *supra*, 267 N. Y. at p. 362; *Blair v. Commissioner*, 300 U. S. 5, 13; *United States v. First National Bank of Birmingham*, 74 F. (2d) 360, 362 (C. C. A. 5th); *Commissioner v. Field*, 42 F. (2d) 820 (C. C. A. 2d)).

In this connection we may also mention that a trust for a term of years is valid under New York law provided that by its provisions it must terminate within the statutory period of two lives.

New York Personal Property Law, Section 11, *infra*, p. 39;

Kahn v. Tierney, 135 App. Div. 897 (2nd Dept.), *aff'd* 201 N. Y. 516).

**Settlor's Reversionary Interest Was Not
a Power to Revest.**

Petitioner has throughout this litigation confused a power to revest with an ordinary right of reversion. This confusion is illustrated by the statement in his brief in No. 383 (p. 19): "There is no difference of substance between a short-term trust and a revocable trust." We submit that the difference is obvious and well settled.

We ask the indulgence of the Court in respect of the following comments which petitioner's contention,—apparently urged seriously,—would seem to render necessary.

A power imports ability on the part of the possessor thereof to exercise an act of will, whereas a reversion is a property right the existence of which is independent of the will of the possessor. This distinction is amply borne out by lay and legal definition. A succinct description of the fundamental characteristics of a power is found in *Perry on Trusts* (5th Ed.), Volume 1, in which the learned author at §248 states:

"... Mere powers [the author distinguishing such powers from those to be exercised for the benefit of others] are purely discretionary with the donee: he may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead and place, if for any reason he leaves the powers unexecuted." (Italics by the author.)

This is consistent with dictionary definition.

Bouvier's Law Dictionary (Baldwin's Ed., 1926): "The right, ability or faculty of doing something." Bouvier further defines "powers of revocation" as "those which are to divest or abridge an existing estate."

Funk & Wagnalls' New Standard Dictionary of the English Language (1937): "1. Ability to act so as to produce some change or bring about some event; * * * 2. Such absence of restraining influence as leaves power of volition to the subject; * * * 4. The right, ability or capacity to exercise authority or control."

Century Dictionary and Cyclopedia: "(1) In general such an absence of external restriction and limitation that it depends only upon the inward determination of the subject whether or not it will act; * * * (2) an endowment of a voluntary being whereby it becomes possible for that being to do or effect something; * * * (5) the ability or right to command or control; dominion; authority; * * *"

The distinction between a "power" and a "reversion" is apparent upon a comparison of the above definitions of "power" with statutory and dictionary definitions of "reversion." The New York Real Property Law, Section 39, contains the following definition of "reversion":

"A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of one or more particular estates granted or devised."

This definition applies to personal property as well as real property (*Davies v. City Bank Farmers Trust Company*, 248 App. Div. 380 (First Dept.)). Cf. N. Y. Real Property Law, Article 5, dealing with powers.

Bouvier's Law Dictionary (Baldwin's Ed., 1926): "Reversion. The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. * * * The reversion is a vested interest or estate and arises by operation of law only." To the same effect, see 21 *Corpus Juris* 1016.

It follows that neither respondent nor any one not adversely interested had any power over the corpus of this trust or the ability to revest in respondent any rights therein. His right was the simple property right of reverter.

The well reasoned opinion of the Board of Tax Appeals herein (Rec., pp. 11-15) as affirmed by the Circuit Court of Appeals, finds ample support in decisions of the lower courts.

United States v. First National Bank of Birmingham, 74 F. (2d) 360 (C. C. A., 5th);

Shanley v. Bowers, 81 F. (2d) 13 (C. C. A., 2nd);

Clifford v. Helvering, 105 F. (2d) 586 (C. C. A., 8th). No. 383 present Term, to be argued with this case.

Knapp v. Hoey, 104 F. (2d) 99 (C. C. A., 2nd).

Numerous decisions of the Board of Tax Appeals to the same effect are set forth in Petitioner's brief in No. 383 (p. 25, footnote).

We particularly commend to this Court the reasoning of the Circuit Court of Appeals for the Fifth Circuit in the *First National Bank of Birmingham* case, *supra*, 74 F. (2d) 360. The case involved a conveyance to an educational foundation which the court treated as a trust for a term of one year from October 1, 1928 to September 30, 1929. The Treasury Department sought to tax to the settlor the income received during the first nine months of 1929 under Section 166 of the Revenue Act of 1928, which provided for taxation of such income to the grantor where he had "at any time during the taxable year . . . the power to revest in himself title to any part of the corpus of the trust." The court unanimously decided that the

grantor was not taxable on this income, Walker, C. J., saying at page 362:

"The corpus of the trust was the granted estate in the described property for the stated period. The income from that property during that period was the grantee's income, not the grantor's income, as it was subject to the unfettered command of the grantee, not subject to any power over it exercisable by the grantor; the source of it being a property interest or estate irrevocably vested in the grantee. (Citing cases.) *The income in question was not taxable against appellee's testator because he did not own that income, or have any beneficial interest therein when it accrued, and did not have the power, either alone or in conjunction with any person not a beneficiary of the trust, to revest in himself the title to the property interest or estate which was the source of that income.*" (Italics ours.)

The mere statement of petitioner's argument that a reversion is the same as a power to revest would seem to bear its own refutation.

In view of the reliance placed by petitioner upon *duPont v. Commissioner*, 289 U. S. 685, and its companion case, *Burnet v. Wells*, 289 U. S. 670 (regarding which we comment below in Point V), it is pertinent to call attention here to the distinction drawn by this court in the *Burnet* case between life insurance premium trusts and trusts where, as in the instant case, no restrictions are placed upon the disposition of the income by the beneficiary, its owner. We quote from the opinion of Mr. Justice Cardozo, pages 681-682:

"Trusts for the preservation of policies of insurance involve a continuing exercise by the settlor of a power to direct the application of the income along

predetermined channels. "In this they are to be distinguished from trusts where the income of a fund, though payable to wife or kin, may be expended by the beneficiaries without restraint, may be given away or squandered, the founder of the trust doing nothing to impose his will upon the use."

Petitioner makes the further contention (Br. in No. 383, p. 26), if we understand him correctly, that the existence of the grantor's power of disposition *before the creation of the trust* is the "power to revest" referred to in the statute, and that such power was exercised by the mere creation of the trust with reversion to grantor. Such a contention, of course, is at variance with all accepted definitions of "power" (*supra*, pp. 8, 9). The word "power", says Farwell (Powers, Ch. 1, p. 1), is a technical term "and is distinct from the dominion which a man has over his own estate by virtue of ownership."

Petitioner's argument seems to be that Congress could not have intended to render the income of a trust taxable to grantor when he has an executory power of revocation and to relieve such income from taxation when he exercises the dominion of ownership by creating a term trust. With all respect we submit that petitioner's contention is specious and would lead to an absurdity. For if his argument be sound, it would apply as well to a ninety-nine year trust or a life trust and would apply as well to a trust where there is no reversion but a gift over to third persons and, in fact, would apply to all types and kinds of income trusts. Thus, every grantor of a trust indenture would be taxed in respect of all of the income during the life of the trust. It would seem to us to be more sensible to attribute to Congress the intention to provide what the clear meaning of the words used indicates.

POINT II.

If there were ambiguity in the language of Section 166, consideration of its legislative history supports respondent's contentions as set forth in Point I hereof.

The provisions of the income tax laws corresponding to Section 166, prior to the changes made in 1934, provided for taxation of the income of a revocable trust substantially as follows:

"Where at any time *during the taxable year* the power to re-vest in the grantor title to any part of corpus of the ~~trust is~~ vested . . . in the grantor . . . then the income of such part of the trust *for such taxable year* shall be included in computing the net income of the grantor." (Revenue Act of 1932, Sec. 166; italics ours.)

Similar provisions were embodied in Section 219(g) of the Revenue Acts of 1924 and 1926 and in Section 166 of the Revenue Act of 1928. The 1934 amendment simply struck out the portions of the earlier acts which are italicized in the above quotation.

The reason for the change is not in dispute. The so-called year and a day trusts—trusts which could not be revoked unless notice of revocation was given prior to the taxable year—escaped the application of the statute. *Langley v. Commissioner*, 61 F. (2d) 796 (C. C. A. 2d); *Commissioner v. Grosvenor*, 85 F. (2d) 2 (C. C. A. 2d); *Lewis v. White*, 56 F. (2d) 390 (D. C. Mass.), appeal dismissed, 61 F. (2d) 1046 (C. C. A. 7th); *Faber v. United States*, 1 F. Supp. 859 (Ct. Cls.). By this device the effectiveness of the statute could in large part be avoided. Indeed, as the court in *Corning v. Commissioner*, 104 F. (2d) 329, 333

(C. C. A. 6th) pointed out, this opened the door, if it did not invite the so-called "year-and-a-day" trusts. The 1934 amendment was designed to close that loophole.

Former Under Secretary of the Treasury Roswell Magill recommended that the statute be amended to include two classes of trusts, that is, revocable trusts and short term trusts. His language is as follows (Hearings on H. R. 7835, 73d Cong., 2d Sess., p. 151):

"The income from short term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trusts."

Congress took action on one of his recommendations, that is, it amended the statute so as to cover trusts revocable "at the expiration of a short period after notice", but took no action in regard to his other recommendation—to wit, that the income from short term trusts should be taxed to the creator of the trust.

The amendment was presented upon the floor of the Senate, passed by the Senate, and accepted by the House conferees. Their report to the House states (H. Rep. 1385, 73d Cong., 2d Sess., p. 24):

"Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year. If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include

the trust income for the taxable year in his return. The Senate amendments require the income *from trusts of this type* to be reported by the grantor. The House recedes. (Italics ours.)

It must be obvious, in the light of this legislative history, that there was no intent to change the meaning of the words "power to revest". The Commissioner does not claim that the words "power to revest" in the statute as it stood prior to 1934 had the meaning he gives them when found in the 1934 amendment. But there is no indication in the history of the amendment of any intent to change that meaning. See *Corring v. Commissioner*, 104 F. (2d) 329, 332 (C. C. A. 6th). Congress was concerned solely with the time within which the "power to revest" granted by the trust instrument could be exercised. It was not concerned with an irrevocable term trust where no "power" to revest is created.

The Commissioner is now attempting to take the action which Congress failed to take.

POINT III.

To the extent that Article 166-1 of Regulations 86 as amended by T. D. 4629, requires the taxation of the income from this trust as income of respondent, the said article is invalid.

The Treasury Regulation relied on by petitioner (*infra*, pp. 34-38) obviously goes far beyond the language of Section 166. Petitioner contends that since Section 166 of the Revenue Acts of 1936 and 1938 are similar to the Revenue Act of 1934, this Regulation has ripened into a sort of legislative fiat (Pet. br. in No. 382, p. 12). This argu-

ment has no substance. Treasury Regulations may properly attempt to construe an ambiguous statute, but they may not go beyond the limitations of a clear and unambiguous statutory provision, as the legislative power is vested solely in the Congress.

Koshland v. Helvering, 298 U. S. 441, 445;

Blatt Co. v. United States, 305 U. S. 267, 279.

There is no ambiguity in the meaning of Section 166 which requires clarification by a Treasury decision.

Moreover, petitioner's contention overlooks the fact that the regulations, since their amendment in 1936, do not purport to rest the taxation of the income of term trusts to the grantor upon Section 166. This was the position of the Treasury Department in the regulations as promulgated on February 11, 1935.

That position, however, was abandoned even before the enactment of the Revenue Act of 1936 on June 22, 1936. T. D. 4629, approved March 7, 1936 (XV-1 Cum. Bull. 140), amended Article 166-1 of Regulation 86 and declared:

“(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. . . .”

After thus recognizing the applicability of Section 166 solely to revocable trusts, which had been denied by the former regulation, Article 166-1 states the important factor to be whether “the title to the corpus will revest in the grantor upon the exercise of such power . . .” (Italics ours). Finally, to make the scope of Section 166 even more explicit, the amended regulation states:

"But the provisions of Section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, *not specified therein*, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus." (*Italics ours.*)

Following that, the amended regulation makes it clear that the contention, that the grantor of an irrevocable term trust may be taxable upon the income, arises, if at all, from "the Act" which "has its own standard" (otherwise undocumented).

After the Treasury thus abandoned Section 166 as its authority for taxing irrevocable trusts of the sort here involved, the question of the applicability of Section 166 to an irrevocable trust was litigated in *Plébe Warren McKean Downs & Commissioner*, 36 B. T. A. 1129, and was decided against the Commissioner. The Commissioner acquiesced (C. B. 1938-1, p. 9). In I. T. 3238 (C. B. 1938-2) the Commissioner squarely ruled that in view of that acquiescence, where "the possible future reversioning of the corpus of the trust in the grantor is governed entirely by the terms of the trust instrument itself and is in no way dependent upon the exercise of any power vested in the grantor," Section 166 had no application.

In view of these administrative rulings, it cannot be seriously argued that Congress has ratified an interpretation which the Commissioner has not only not made but has expressly repudiated.

POINT IV.

Petitioner will not be heard to urge here that this case is governed by Section 22(a) of the Revenue Act of 1934.

Petitioner at no stage of this proceeding prior to his application for certiorari took the position that the income was taxable to respondent under any provision of the Revenue Act of 1934 other than Section 166 or Section 167. In his notice of deficiency, the Commissioner stated that the dividends which he proposed to tax as income of the petitioner were to be so taxed because "paid on stock held in a revocable trust created by you for the benefit of your wife" (Rec., p. 7; italics ours). It is to be noted that the only section of the Revenue Act of 1934 dealing with the taxation of income from revocable trusts is Section 166. Before the Board of Tax Appeals, the petitioner relied solely on Sections 166 and 167 and in the Circuit Court of Appeals he rested his entire case on Section 166 (see *supra*, p. 4).

Petitioner endeavors to show (Br., pp. 6 to 8) that he has saved his point for review. But it is submitted that he states himself out of court by the admission (p. 6): "We concede that the Government's brief in the court below expressly waived reliance upon any section other than Section 166."

This Court does not favor injection of a new point at this stage of a litigation.

In *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, an income tax case, the Commissioner urged before this Court a construction of Section 202 (b) of the Revenue Act of 1918, which had not been presented to any of the courts below.

In refusing to pass upon this point, the Court said at page 498:

"The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering v. Minnesota Tea Co.*, 296 U. S. 378, 380. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies. His failure earlier to present the question leaves this court without the assistance of decision below. His petitions for these writs did not present the question to this court. We are not called on to consider the construction of §202 (b) now proposed" (citing numerous cases).

In *Helvering v. Minnesota Tea Company*, 296 U. S. 378, another income tax case, the Court disposes of one contention of the Government as follows (p. 380):

"This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it."

So, also, in *Burnet v. Commonwealth Improvement Co.*, 287 U. S. 415, another income tax case, the Court states, page 418:

"The Board of Tax Appeals expressed no opinion concerning the Commissioner's method of reckoning—it was not requested so to do. There the respondent relied entirely upon the second point. The Circuit Court of Appeals ruled only on the same point. In such circumstances, we do not undertake to determine what was not considered below."

See also *General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, 206.

It should be noted that petitioner does not question the rule that reversal cannot ordinarily be sought upon a ground not urged below (Br., p. 7).

V.

Even were the point open for consideration, neither Section 22(a) nor any other provision of the 1934 act renders the income of this trust taxable to respondent.

We believe, as we have stated in Point IV, *supra*, that the instant case does not involve the question of the taxability of the income of this trust under Section 22(a). But, even if that independent basis for decision were open to petitioner, we believe that his argument with respect to its application must fail.

The securities which the respondent placed in trust yielded in 1934 dividends of \$8,750 (Rec., p. 4). The petitioner contends that this sum should be taxed as income of the respondent. To support that claim he argues that Congress, by the use of the general language of Section 22(a), intended to "use its power to the full extent." (Brief in No. 383, p. 10.) But this does not help in the resolution of the problem of this case. Whether or not Congress meant to tax *all* income is not the question. Of course this \$8,750 must be taxed to someone. The question here is to whom it is to be taxed—the beneficiary of the trust, or the settlor. Congress meant to apply its maximum taxing power to the beneficiary just as much as to the settlor. Even the petitioner does not contend that Section 22(a) is to be interpreted as evidencing a purpose on the part of Congress to tax *both* to the utmost.

Quite apart from all statutes, regulations, and decisions, it would seem more natural, with respect to trusts of the

character of the one here involved, to attribute the income to the beneficiary than to the settlor. The person who has the income free in his hands, and can use the income to satisfy the tax collector, would generally be the person to pay the income tax. *Blair v. Commissioner*, 300 U. S. 5; *Hooper v. Tax Commissioner*, 284 U. S. 206; *Shanley v. Bowers*, 81 F. (2d) 13 (C. C. A. 2d). To be sure, there may be a twilight zone—a zone of uncertainty as to which one should pay the tax, for all will admit that the same income cannot be taxed to two different persons. There may be situations where Congress might properly declare the result, basing its judgment on a weighing of the interest of each in the income, the avoidance of surtaxes, the ease or certainty of collections, or a variety of other factors. But Congress has done nothing here to attribute the income to any one but its recipient.

The statute considered by the Court in *Burnet v. Wells*, 289 U. S. 670, and *duPont v. Commissioner*, 289 U. S. 685, is an instance of a Congressional declaration. The issue there was solely one of constitutionality. In those cases the Court considered a statute which declared that the income from a so-called insurance trust should be taxed to the settlor. That the Court clearly distinguished those cases from trusts such as the Wood trust is shown by Mr. Justice Cardozo's statement quoted, *supra*, pages 11, 12.

Certainly, in the instant case, no one would dispute that it would be more natural to attribute the income to the beneficiary than to the grantor. We will show below, in discussing the various elements upon which petitioner relies, that the trust income here was irrevocably committed to the beneficiary. This income was hers to do with as she wished; there were no strings attached to it. The normal and natural presumption in this case is that here the bene-

fiary, not the grantor, is the one to whom the taxing power of Section 22(a) was extended.

But we can go farther. Congress itself has indicated that the income from all trusts (with certain exceptions which do not apply, *cf.* Point I, *supra*) shall be taxed not to the grantor, but to the beneficiary.

Sections 161 to 167 of the Revenue Act of 1934, inclusive, deal with the taxation of "estates and trusts". Section 162(b) provides that "in computing the net income of the estate or trust the amount of the income . . . which is to be distributed currently by the fiduciary to the beneficiary" shall be allowed as a deduction, "but the amount so allowed as a deduction shall be included in computing the net income of the beneficiary". That is a general rule applicable to all trusts, including ordinary term trusts. Sections 166 and 167 make an exception of certain trusts, such as revocable trusts, insurance trusts, etc., but, as we have shown in Point I, *supra*, the present trust is not taxable under Section 166, and Section 167 is not involved in the case.

If there be a "twilight zone", then, Congress has legislated in regard to it. Congress has said that income of trusts generally shall be taxed to the beneficiary and has defined specifically the exceptions, which exceptions definitely do not include term trusts. *Expressio unius est exclusio alterius*.

Nor does *Douglas v. Willcuts*, 296 U. S. 1 (Pet. Br., in No. 383, pp. 10, 21), destroy the force of this Congressional declaration. The Court stated that, despite the specific provisions of Sections 166 and 167, income which "in contemplation of law" remained "in substance that of the grantor" should be taxed to him (296 U. S. at p. 10). The Court was there dealing, however, with a situation in which the grantor himself was in reality the beneficiary of the trust—

the income was used to discharge an obligation which he would otherwise have had to meet. The Court stated that the provisions of the statute quoted above do not (p. 10)

"preclude the laying of tax against the one who through the discharge of his obligation enjoys the benefit of the income as though he had presumably received it."

No such situation is present here.

Therefore, we start out with the initial assumption that the beneficiary who in fact received the income as her free unfettered possession is the one to pay the tax. Next, we have to inquire how that initial assumption is affected by, first, the regulations of the Treasury Department, and, second, the decisions of this Court.

The regulations (*infra*, pp. 34-38) are petitioner's chief reliance (Br. in No. 383, pp. 10-15, 26, 27). But they fail him in two respects. Seemingly he relies upon the re-enactment of the statute after their promulgation as creating a Congressional mandate (Br. in No. 383, pp. 12, 26). It seems clear, however, that, if they are used to warrant the taxation of income to A which would naturally be taxed to B, they are directly within the rule that regulations which seek to expand the statute are a nullity (see Point III, *supra*, p. 15).

But whether or not they are a nullity under the above rule, they cannot assist petitioner here. It is impossible to find any clear direction in them. They say, in the most general terms, that the income of a trust is to be taxed to the settlor "if he is regarded as remaining in substance the owner of the property." But Article 166-1 gives no guide as to when that situation exists. Certainly the Article does not say that all term trusts (or even all short-term trusts, whatever that may mean) are included in that

category. It does not say that all trusts in which the grantor is the trustee are to be included. In fact, that element, so strongly relied on here, is not even mentioned. It gives no hint whether the time "three years" in the illustration is the maximum term, or the average. Indeed, notwithstanding petitioner's statement to the contrary, we have considerable doubt whether the instant case is within the regulations at all. It is not clear whether the "son John" mentioned in the illustration (Pet. Br. in No. 383, p. 11) means a child or relative to whom the grantor owes a legal obligation of support, or otherwise; or whether the regulation would apply equally to a trust for one, three, ten or twenty years. There is no specific rule for guidance as the regulation is unclear. Petitioner's decision to allocate this income to respondent is entitled to no more consideration than the facts of the case warrant.

We turn, then, to examine the facts of this case upon which petitioner relies to change the ordinary presumption and the Congressional mandate. We think it demonstrable that there is nothing so peculiar about the trust as to take it out of the ordinary rule.

(a) *The fact that the beneficiary was the wife of the settlor.* This is so minimized by petitioner as to make it doubtful whether he attaches any importance to it. (See, however, Br., p. 6, and Br. in No. 383, pp. 14, 22.) The mere fact of the relationship is obviously not sufficient. The income here was not to be used to discharge a legal obligation of respondent to his wife, as in *Douglas v. Willcuts*, 296 U. S. 1, nor to support his minor children.

(b) *The fact that the trust is for a term of years.* The next element relied upon by petitioner is that this trust was for a period of five years (Br., p. 5, and Br. in No. 383, pp. 11, 24, 27). This contention affects the corpus, rather than

the income, and seeks to attribute income to respondent because of his asserted interest in the "tree upon which it grew."

Petitioner has confused the instant case with decisions of this Court holding that mere assignments of income to be earned in the future will not avail to relieve the assignor of income taxes (Pet. Br. in No. 383; pp. 17, 18), but professes to have no quarrel with the doctrine that, where the corpus and the income are effectively disposed of, at least for a substantial period of time, the income is not taxable to the grantor simply because he may sometime in the future recover the corpus for himself (*Id.*, p. 13). In *Blair v. Commissioner*, 300 U. S. 5, the distinction between the two situations is effectively stated at pages 11 and 12:

"The tax here is not upon earnings which are taxed to the one who earns them. Nor is it a case of income attributable to a taxpayer by reason of the application of the income to the discharge of his obligation. *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716; *Douglas v. Willcuts*, 296 U. S. 1, 9; *Helvering v. Stokes*, 296 U. S. 551; *Helvering v. Schweitzer*, 296 U. S. 551; *Helvering v. Corey*, 297 U. S. 694. See, also, *Burnet v. Wells*, 289 U. S. 670, 677. There is here no question of evasion or of giving effect to statutory provisions designed to forestall evasion; or of the taxpayer's retention of control. *Corliss v. Bowers*, 281 U. S. 376; *Burnet v. Guggenheim*, 288 U. S. 280.

In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership. See *Poe v. Seaborn*, *supra*; *Hoeper v. Tax Commission*, 284 U. S. 206."

Certainly in the present case the title to the corpus of the trust has been effectively transferred just as it was in the

Blair case. The tree as well as the fruit is gone, for a period of years. Can it be said that the grantor retains the substance of enjoyment of the corpus during the trust period simply because at the end of the period the corpus will revert to him? We believe not (see cases under Point I, *supra*, pp. 10, 11).

duPont v. Commissioner, 289 U. S. 685, relied on by petitioner, does not aid him (see discussions, *supra*, pp. 11, 12, 21). The trusts there involved required that the income should be used to pay premiums on the grantor's life insurance. The "many attributes of ownership" retained by the grantor which were referred to by the Court as warranting the taxation of such income to the grantor (289 U. S. 689) obviously refer to both the earmarking of the income and the length of the trust. As we have shown above, there is no such earmarking here, nor is there any equivalent of it. We submit, rather, that the instant case is, so far as this aspect is concerned, directly within the principle of the *Blair* decision, which recognizes that an effective, irrevocable transfer of corpus and income, even though they may ultimately revert to the grantor, makes the recipient of the income, and not the grantor, the real beneficiary of the income, and the one who should pay the tax.

In *Griffith v. Helvering*, No. 49, this Term, this Court held that the assignment of stock to be sold at a profit by a controlled corporation did not relieve the grantor of taxation upon the profit. It is apparent that it was control of the income through the medium of stock ownership which formed the basis for the decision. Here, on the contrary, respondent lost completely any voice in the manner in which the income was to be used.

(c) *The fact that the grantor is trustee and as such exercised certain formal powers.* The third element on which

petitioner relies is the fact that the respondent is himself trustee (Br. in No. 383, pp. 14, 15), and as such had certain formal powers (*supra*, p. 3). As trustee, like any other trustee, he had administrative duties with respect to the trust property. We assume that petitioner is not claiming that the trust was a sham. No such issue was raised below, and there was no evidence on that point, nor any occasion to adduce any. But, except for that possible claim, there is no relevance to the point that the settlor was the trustee. *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48. Petitioner himself would not assert a general rule that the fact that the settlor is trustee is sufficient to cause the income to be taxed to him. When the income from the corpus is beyond the control of the settlor, and when the ownership of the corpus has been effectively transferred for a substantial period of time, the privilege—or right if petitioner chooses so to term it—of preserving the trust estate until it may ultimately return to the settlor, is wholly unimportant. The tax here is upon income; and not upon corpus. *Douglas v. Wilcutts*, *supra*.

Petitioner has placed particular emphasis upon the right of the trustee (who was the respondent) to determine whether property or money received from the trust should be treated as capital or income (Pet. Br., pp. 5, 6). But this is a customary provision in New York trusts, as are the other formal provisions above referred to, and as stated above, this power was given as well to any substituted trustee (Rec., p. 21). Any one familiar with the difficulty which the New York Court of Appeals has had in dealing with the problem of allocating extraordinary dividends and unusual distributions as between principal and income will understand why draftsmen of New York trusts customarily attempt to obviate this fruitful source of litigation. (See *Matter of Osborne*, 209 N. Y. 450; *Equitable Trust Co. v.*

Prentice, 250 N. Y. 1.) The existence of this and other powers does not lead to the conclusion that respondent ignored or intended to ignore his duties as trustee (see *Poe v. Seaborn*, 282 U. S. 101, 112). Actually, none of the powers listed on page 3 hereof (except the power to retain in the trust the Book-of-the-Month Club, Inc. stock) was exercised by respondent.

It should be further noted that a retention of any actual income in principal account would violate the New York statute regarding accumulations (N. Y. Pers. Prop. L., Sec. 16, *infra*, p. 39). The fact is, as above stated, that all income was paid to the beneficiary.

We submit therefore, that the factors on which petitioner relies to justify the application of the regulations are, when examined, of little weight. Admittedly, no one of them alone is sufficient. Nor do the three together add up to more. No decision of this Court has sanctioned the position which petitioner now adopts.

In the final analysis there is nothing in the statute, the regulations or the decisions which warrants taxing the income of this trust to respondent unless the trust is fictitious. Even petitioner seems to recognize this, for after considerable circumlocution he refers to the trust device as a "fiction" (Br. in No. 383, p. 16). This is finally the real test in the case. Petitioner recognizes that to win he must assert that the trust device was a "fiction." If the trust was a fiction, then of course it should be disregarded. If it was not a fiction, both normal principles and Congressional mandate direct that the income shall be taxed to the beneficiary. But how was it a fiction? Is every term trust a fiction? Is every trust for a wife a fiction? Is every trust where the settlor is trustee a fiction? These are the only elements that petitioner speaks of or that are in the case upon which such assertions could be made. But no

one of them is enough on which to base an assertion of fictitiousness. Nor are all of them taken together any better.

It is not true, as petitioner asserts (Br., in No. 383, p. 14), that the respondent was no poorer by the creation of this trust. On the contrary, in the year 1934 he was poorer by the sum of \$8,750. It is not to be assumed that a wife's expenditures are directed by the husband, and for his benefit. In the year 1934 no part of this \$8,750 was available to the respondent. If a man chooses honestly to relinquish both property and income, rather than to pay the tax upon the income, there is nothing in the statute or the decisions which says he may not do so.

Petitioner further stresses tax avoidance (Br. in No. 383, pp. 28, 29). He points out that while admittedly Congress may not tax A on B's income (*Hoeper v. Tax Commission*, 284 U. S. 206), it may adopt reasonable measures to prevent escape from the surtaxes which it imposes. But here Congress has not acted in that direction. Indeed, despite a recommendation by the Treasury Department that it should take action with respect to term trusts; and despite the fact that a simple statutory solution lay ready at hand (see English statute, Pet. Br. in No. 383, p. 27, footnote), Congress refused to act. (See Point II, *supra*, p. 13.) The Department took matters into its own hands by the promulgation and attempted enforcement of Article 166-1.

Lacking Congressional mandate, the Department was forced to attempt some vague limits of its own. Petitioner now asserts (Br. in No. 383, p. 13) that precisely where the line should be drawn is a matter which should be left to the unfettered discretion of the Department. Its regulations state (Art. 166-1(b)) that in determining whether the

grantor is in substance the owner of the corpus "the Act has its own standard, which is a substantial one." We search in vain in Section 22(a), or in any other section of the Act, for the basis for that statement.

But if the Act can be said to have a "substantial standard," certainly it is not articulated in the regulations or in petitioner's brief. We have already pointed out the impossibility of determining with any particularity whatever the application which he makes of the elements involved here to any other case. So far as the regulations or the brief is concerned, the standard lies hidden in the Commissioner's own conscience. Petitioner admits that the income of a long term irrevocable trust would not be taxed to the settlor (Br. in No. 383, p. 13). Yet he also stresses in his brief in the instant case that at the end of the tax year 1934 the trust here was less than a 16-month trust (Br., p. 5). Does he mean that no matter how long the trust, its income becomes taxable to the grantor when it gets so near the end that, if then created, it would be taxable to him? It is difficult to attribute any other meaning to the remark, yet it introduces a double element of vagueness.

We do not believe that Congress intended, or would wish, that this great body of ill-defined doctrine should flower from the simple language of Section 22(a). Nor do we believe, as necessarily follows, that this Court can look forward with equanimity to the task of gradually defining the limits of such a principle. The petition for certiorari in No. 383 (p. 8) says that there are now pending 43 cases presenting this same issue. It is a fair assumption that many of them will present distinct problems which will have to be litigated. New problems will certainly arise. If ever a vista of litigation were opening, it is in petitioner's contention in cases now before the Court.

The solution, of course, is to attribute income, until Congress speaks to the contrary, to the person who receives its benefit—to the person who, if Section 22(a) stood alone, would normally be taxed upon it, and to the person who, Congress has said, should be taxed upon it. Section 22(a) is not weakened by this—indeed it is considerably more literally and accurately applied than petitioner would have it in the present case. Congress, then, instead of the Courts, will enact legislation if it believes it necessary. Congress then will define, with accuracy, the extent to which it believes that the income of term trusts should be taxed to the grantor in order to prevent the avoidance of surtaxes. But, we submit, until Congress does so speak, the income should be taxed, as Congress has directed, to the one who receives it, who enjoys it, and who can pay taxes out of it—the beneficiary.

POINT VI.

If Section 166 or Section 22(a) or any other provision of the 1934 Act had the effect of taxing income from this trust to respondent, its constitutionality would be doubtful.

Respondent further submits that were the Revenue Act of 1934 to be construed as desired by petitioner, its constitutionality would be seriously imperilled. Congress has no authority to tax to one person the income of another.

Hooper v. Tax Commission of Wisconsin, 284
U. S. 206.

In this case it appeared that the Wisconsin income tax law provided that a husband should report as his own in-

come the independent income of his wife. This Court in holding the statute unconstitutional said (p. 215):

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols v. Coolidge*, 274 U. S. 531, 540."

There is no doubt that the Court would reach a similar conclusion with regard to a similar act of Congress. For example, the following language appears in *Helvering v. City Bank Farmers Trust Company*, 296 U. S. 85 (relied on by petitioner, Br. in No. 383, p. 29), where this Court states, page 92:

"There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment. In the same category falls a statute seeking to tax the separate income of a wife as income of her husband."

Indeed, in the *Hooper* case itself, at page 215, immediately preceding the above quoted portion of its opinion the Court quoted from *Knowlton v. Moore*, 178 U. S. 41, 77, with respect to the powers of Congress as follows:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Conclusion.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

GEORGE M. WOLFSON,
Attorney for Respondent.

DEAN G. ACHESON,
Of Counsel.

January, 1940.

Appendix.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) General Definition.—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . . (U. S. C., Title 26, Sec. 22.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 166.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 166-1 [as amended by T. D. 4629, XV-1 Cum. Bull. 140, 141 (1936), and T. D. 4759, 1937-2 Cum.

Bull. 117, 118]. *Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.*—(a) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this article the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus or the income therefrom adverse to the grantor, or both, may cause the title to the corpus to revest in the grantor. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless of—

(1) whether such power or ability to retake the trust corpus to the grantor's own use is effected by means of a power to revoke, to terminate, to alter or amend or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revest in the grantor in possession and enjoyment, whether such time is within the taxable year or not,

or whether such time be fixed, determinable, or certain to come;

(4) whether the power to revest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitely with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveying device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(c) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whosoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revert in himself in (A) upon ~~the~~ expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

(d) If the grantor is regarded as remaining in substance the owner of the corpus the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

If the grantor strips himself of the substantial incidents or attributes of ownership in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to revert title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

New York Personal Property Law:

§11. SUSPENSION OF OWNERSHIP.

The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator; except that a contingent gift in remainder may be made on a prior gift in remainder, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the interest of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority. Lives in being or a minority in being shall include a child begotten before the creation of the estate but born thereafter. In other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property.

§16. VALIDITY OF DIRECTIONS FOR ACCUMULATION OF INCOME.

An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid:

1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority.

2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority.

3. All other directions for the accumulation of the income of personal property, not authorized by statute, are void. In either case mentioned in subdivisions one and two of this section a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority. * * *

(Certain provisions, dealing with accumulations in special types of trusts, such as trusts for charitable or educational institutions, employers' pension trusts and trusts for the payment of insurance premiums are omitted.)

§23. REVOCATION OF TRUSTS UPON CONSENT OF ALL PERSONS INTERESTED.

Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

New York Real Property Law:

§39. DEFINITION OF REVERSION.

A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of one or more particular estates granted or devised.

SUPREME COURT OF THE UNITED STATES.

—No. 384.—OCTOBER TERM, 1939.

<p>Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Meredith Wood.</p>	}	<p>On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.</p>
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[February 26, 1940.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case, like *Helvering v. Clifford*, — U. S. —, is here on certiorari, the problems in the two cases being the same in certain essential respects. In April 1931 respondent, who owned twenty-five shares of stock of Book-of-the-Month Club, Inc., made himself trustee of those shares under an agreement which was to expire in three years¹ or earlier on the death of either him or his wife. By the trust he was to "hold, invest, and reinvest" the shares, to "collect the net income therefrom" and to pay it to his wife. He had the power to "retain" the stock or to "sell" it or "any part thereof" at such "time and on such terms" as he should "deem proper".² It was provided that his power of investment or reinvestment of "any of the property or moneys held in trust" was not to be restricted by any law governing investments by trustees. He was also given power to "fix and determine" the value of the property for all purposes of the trust and to determine "whether any property or money received or held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income," with the proviso, however, that stock dividends and subscription rights should be treated as principal. He was prohibited from receiving any commissions with respect to principal or income; and an exculpatory clause purported to protect him against any loss except that occasioned by his wilful misconduct. He had

¹ In 1932 the term was extended to five years from April, 1931.

² His right to sell was subject to a collateral agreement, not material here, with one Scherman, granting Scherman a preemptive right in case respondent decided to sell.

the power to appoint a substitute trustee.³ On termination of the trust "all property then held in trust" was to go to him. The trust contained no power of revocation nor any power to revest in the grantor at any time, prior to the date of termination, title to any part of the corpus.

During 1934 respondent paid over to his wife \$8,750, which was the entire income from the trust for that year. She included it in her income tax return. The Commissioner, being of the opinion that the income was taxable to respondent, determined a deficiency in his 1934 return. Respondent appealed to the Board of Tax Appeals which held that petitioner was in error (37 B. T. A. 1065). The Circuit Court of Appeals affirmed (104 F. (2d) 1013) on the authority of *United States v. First National Bank of Birmingham*, 74 F. (2d) 360.

Petitioner maintains that the trust income is taxable to respondent either under § 166 or § 22(a) of the Revenue Act of 1934 (48 Stat. 680) or both.

By § 166 the income from a trust is taxable to the grantor where "at any time the power to revest in the grantor title to any part of the corpus of the trust is vested" in him or in any person "not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom."⁴ Petitioner has not undertaken to establish that under New York law, which governs this trust, respondent had the power to revoke it prior to the end of the term. But in his contention that the trust here involved is covered by § 166, petitioner points out that there is no practical difference between a revocable trust and one certain to be terminated soon. And he argues that it would not be sensible to impute to Congress a purpose to impose the tax when the grantor has an executory power to revest title in himself but to withhold the tax when the

³ No substitute trustee was, however, appointed, respondent continuing to act as trustee until termination of the trust in 1936.

⁴ Sec. 166 reads in full:

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

"(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

grantor, by provisions in the trust deed, has already exercised that power.

Our difficulty lies not in an inability to see the similarity of those situations but in being able to say that Congress treated them the same under § 166. A power to revest or revoke may in economic fact be the equivalent of a reversion. But at least in the law of estates they are by no means synonymous. For, generally speaking, the power to revest or to revoke an existing estate is discretionary with the ~~donee~~ ^{donor}; a reversion is the residue left in the grantor on determination of a particular estate. See Tiffany, Real Property (2nd ed.) § 129 *et seq.*, § 316 *et seq.* Congress seems to have drawn § 166 with that distinction in mind, for mere reversions are not specifically mentioned. - Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it. That seems to us to be the case here. Whether wisely or not, Congress confined § 166 to trusts where there was a "power to revest". The problem of interpretation under § 166 is therefore quite different from that under § 22(a). The former is narrowly confined to a special class; the latter by broad, sweeping language is all inclusive. *Helvering v. Clifford; supra.* Accordingly, the wide range for definition and specification under the latter is lacking under § 166. And so far as § 166 is concerned no apparent or lurking ambiguity requires or permits us to divine a broader purpose than that expressed. The legislative history corroborates this conclusion. When the 1934 Act was before the House Committee, the Treasury recommended that income from short term trusts and from revocable trusts should be taxable to the creator.⁵ The Congress adopted the latter⁶ by an

⁵ Revenue Revision, 1934, Hearings before the Committee on Ways & Means, H. R. 73rd Cong., 2nd Sess., p. 151. The recommendation read: "The income from short term trusts and trusts which are revocable by the creator at the expiration of a short period, after notice by him should be made taxable to the creator of the trust."

⁶ Conference Rep. No. 1385, H. R. 73rd Cong., 2nd Sess., p. 24:

"Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year.

appropriate amendment to § 166; but it did not select the former for special treatment. When such clear choice of ideas has been made in the drafting of a specific provision of the law, its language must be taken at its face value. Sec. 166 is therefore not applicable to this trust since respondent is given no power to recall the corpus. He or his estate gets it at the end of the term, on the death of his wife, or on his own death—whichever is the earliest.

For a wholly different reason, petitioner's argument based on § 22(a) must fail. The Board of Tax Appeals purported to place its decision solely on § 166 and § 167 of the Act. Petitioner in his assignments of error specifically mentioned only § 166 and § 167, not § 22(a). In his brief before the Circuit Court of Appeals petitioner expressly waived reliance upon any section other than § 166. Though petitioner in his petition for certiorari relied on § 22(a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. As we have indicated, the issues under § 166 and § 22(a) are not coterminous. Though both deal with concepts of ownership, the range of inquiry under the latter is broad, under the former confined. To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation.⁷ See *Burnet v. Commonwealth Improvement Co.*, 287 U. S. 415, 418. It is not apparent why a less strict rule is necessary in order adequately to protect the revenue.

Affirmed.

Mr. Justice ROBERTS concurs in the result.

If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include the trust income for the taxable year in his return. The Senate amendments require the income from trusts of this type to be reported by the grantor. The House recedes.

⁷ Art. 166-1 of Treasury Regulations 86, originally promulgated under § 166, was not promulgated under § 22(a) until 1936 (T. D. 4629), two years after the tax liability here in issue occurred. Hence we do not have a case of reliance by the government on a regulation which during the taxable year in question rested on two legs, one of which was § 22(a).

MICRO CARD

TRADE MARK

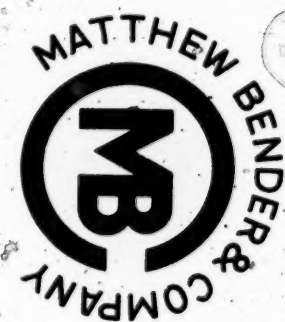


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